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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 232.

RETAIL STORE EMPLOYEES UNION LOCAL 954,

Petitioner,

v.

LANE DRUG COMPANY,
a Division of A. C. Israel Commodity Corporation, Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc. and Lane's of Oregon, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

JOSEPH E. FINLEY,
METZENBAUM, GAINES, KRUPANSKY, FINLEY & STERN,
700 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Petitioner Retail Store Employees Union Local 954.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, Retail Store Employees Union Local 954, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit wherein it granted a petition for review and refused to enforce that part of an order of the National Labor Relations Board which directed respondent Lane Drug Company and affiliated Companies to bargain with petitioner.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, pp. 1a to 15a) is not yet reported officially. The Board's decision and order, including the Trial Examiner's decision, are reported at 160 NLRB 1147 (Appendix B, pp. 15a-80a).

JURISDICTION.

The opinion of the Court of Appeals was entered on March 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Where enforcement is sought of a National Labor Relations Board order requiring an employer to bargain with a union whose majority is based upon authorization cards, and where it is found that the employer committed acts of interference, restraint, and coercion designed to undermine the union and also refused to submit to an impartial card check when there was no issue as to the validity and purpose of the authorization cards, are these factors legally sufficient to meet the substantial evidence test to prove the employer's lack of good faith doubt as to the Union's majority?

2. Where enforcement is sought of a National Labor Relations Board order requiring an employer to bargain with a union whose majority is based upon authorization cards, and when the Board finds undisputed probative evidence of the employer's lack of good faith doubt, may a reviewing court rely upon separate factors in the case to assess and weigh the evidence to set aside the Board's order?

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, et seq., are set forth in Appendix C, p. 81a.

STATEMENT OF THE CASE.

Professional pharmacists in 17 drug stores operated by the Lane Drug Company in Toledo, Ohio, and vicinity began a campaign in late 1964 and early 1965 to consider the possibilities of unionization. One of their number, William A. Nupp, assumed the leadership in this campaign. After Nupp was dissuaded for a short time by employer promises, the campaign was renewed in April 1965. A committee of pharmacists discussed possible unionization with two other unions before seeking the unsolicited aid of petitioner in this case. The pharmacists' committee, led by Nupp, arranged for a representative of petitioner to attend a meeting held on April 28, 1965, for the purpose of explaining the benefits of unionization to assembled pharmacists, and acting upon possible organization. On the eve of the meeting, Nupp was fired by the employer for his activity in behalf of unionization, as found by the Board and upheld by the Court of Appeals.

At the April 28 meeting, union representative Leedy told the pharmacists that the union would not seek an election but would use the signed membership cards of the pharmacists to pursue a demand for recognition and bargaining (J.A. 96a). There was never any claim or contention made as to any invalidity of any of the cards signed, or that they were executed for any other purpose than seeking recognition and bargaining. On the following day, after the union had secured sixteen signed authorization cards, it made its first demand upon the employer for recognition. The trial examiner found that the union possessed a majority of 16 out of 31 pharmacists in the unit on that date, but the Board included an additional pharmacist in the unit and found that no majority existed on April 29. However, the union campaign continued, and by May 4, 1965, one more authorization card had

been secured. On this date, a second demand was made upon the employer for recognition along with an offer to submit the union's majority claim to the Toledo Labor-Management-Citizens Committee for verification. The examiner, the Board and Court below all found that on May 4, 1965, the union did possess a majority of 17 pharmacists in the unit. Two additional cards were secured by the pharmacists within the next few days, increasing the count to 19 out of 32.

The trial examiner found, and the Board agreed, that the employer violated Section 8(a)(1) of the Act by coercively interrogating employees, promising them economic benefits, enlisting employees to engage in surveillance, acting to dissuade other employees from supporting the union, soliciting employees to deal directly with the employer instead of through a union bargaining representative, and threatening them with economic detriment for continuing their union affiliation or collective bargaining endeavors (J.A. 606a).

The Court of Appeals rejected only this part of the Board's finding as to unlawful interrogation. The Court, in affirming the remaining violations of Section 8(a)(1), stated:

> The pharmacists were, however, promised benefits if they would deal with the employer directly * * *. They were asked to prevail on other employees to deal directly with the employer. The employer told pharmacists that he would not deal with the union. The employer's conduct, in our opinion, constituted interference of the employees' right to organize, guaranteed under Section 7.

The examiner, upheld by the Board, made a series of devastating findings in rejecting the employer's claim of good faith doubt as to the union majority. The employer

interposed the defense that it doubted the appropriateness of the bargaining unit. Yet the employer filed a representation petition, in which he detailed the same unit found by the examiner to be appropriate (J.A. 583a), and even designated the numerical composition as low as 25 (J.A. 490a). The employer only contended that it had doubt of the numerical majority—never the bona fides of the authorizations of any of those who signed for the union to represent them. The examiner pointed out that the employer spurned the union's express offer to establish proof of its majority status through the good offices of the Toledo Labor Management Citizens Committee (J.A. 584a).[1]

The examiner further pointed out that a letter from the employer's president to all pharmacists showed "the true cast of respondent's thinking to be that in refusing to recognize, meet or bargain with the union, respondents were not motivated by doubt as to the union's representative status, but rather unwillingness to deal with the union even if it did in fact represent its pharmacists."

The examiner further found that Kaye, the operational vice president of the employer, told one of the pharmacists that he knew there were 19 signatures for the union and the company only had 10 against (J.A. 548a). It was also found that another supervisor told the same pharmacist that the company knew that the count of the votes stood at 19 to 10 with 19 of the pharmacists for the union and 10 against (J.A. 549a). (This evidence alone, if credited—as it was by the Board and never contradicted—should be sufficient to resolve any issue

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[1] The role of the Toledo L-M-C is well known to this Court and the Sixth Circuit in its efforts to bring labor peace to the community. See *Retail Clerks International Association v. Lion Dry Goods Company*, 369 U.S. 17.

about good faith doubt of the union's majority.) The examiner further found that Kaye had told the pharmacist that "those who signed (union) cards don't mean anything, and we have plenty of time with your help * * * to change those signatures." (J.A. 552a). His testimony was credited by the examiner, upheld by the Board, and likewise never contradicted.

The examiner also found that Kaye told pharmacist Maza that the "company would never allow the union to be formed here, no matter what it cost." The examiner also found that another vice president, Rivelis, told another pharmacist that the company "would never deal with the union" (J.A. 555a). None of this testimony was challenged or contradicted in any manner.

In addition to the findings of violation of §§ 8(a)(1) and 8(a)(3) in the discharge of pharmacist Nupp, the Board also upheld the trial examiner's finding as to the refusal to bargain after the demand of May 4, 1965, and in all other respects pertinent here, affirmed the lengthy and thorough opinion of the trial examiner.

The Court of Appeals, after affirming the Board as to the § 8(a)(1) violations as set forth above, and affirming without extended discussion the Board's finding as to the unlawful discharge of pharmacist Nupp, rejected the Board's finding of a violation of Section 8(a)(5). The Court never questioned the existence of a majority on May 4, and after, but said there was not substantial evidence to support the Board's finding of the employer's lack of a good faith doubt.

The Court, in its opinion, omitted any discussion of the extensive evidence found by the examiner and the Board to show lack of good faith doubt on the part of the employer except for two items, the findings of violations

of Section 8(a) (1) and the rejection of the union's request for an independent card check. The violations of Section 8(a) (1) were passed off as "not of itself sufficient reason to negative a good faith doubt," and further stated that "An 8(a) (1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with a belief in the majority status."

The Union's request for a card check was passed off with the statement that the use of authorization cards was a "notoriously unreliable method of determining the majority status of a union," without any consideration of the facts and evidence surrounding the signing of the cards, the purpose for which the cards were signed, and the extensive employer knowledge of the continued campaign of the pharmacists to organize themselves into a union.

The Court devoted most of its discussion to a consideration of the reasons advanced by the employer as to why there was a good faith doubt as to the numerical majority of the union. The Court placed reliance upon testimony of one supervisor who stated that he had talked with some pharmacists who advised him that they did not think many were interested in the union, despite characterizations by the examiner, who observed the witness, that the supervisor was "unnecessarily evasive and vague about these conversations, incredibly testifying that he 'more or less listened to what they had to say about it' and that he 'didn't really do any questioning as to what took place.' "

The Court also placed reliance on the fact that the same union had made a written demand for recognition in early 1954 as bargaining agent for some of Lane's clerical employees, and had been defeated in a National

Labor Relations Board election. The Court also referred to the union's "hurry" in demanding recognition as a factor that the employer could take into account in establishing his good faith doubt. The Court also pointed to the so-called "slim margin" as another factor the employer could consider (even though the employer admitted that the union had 19 signed cards at a time when the union had exactly that number).

The Court also said that the union's demands did not clearly designate the stores or the pharmacists the union claimed to represent. This so-called "lack of clarity" was another reason for Lane to doubt the majority of the union. Then it stated that there were other questions of eligibility of inclusion of certain pharmacists in the unit, which was another factor the employer could rely upon. The Court even went so far as to point out that one of the pharmacists who was excluded as a supervisor had attended the organization meeting of April 28, and said "he must have been considered eligible to attend and participate in the union." This selective reading of the evidence, like much of the Court's evaluation, failed to take into account the actual fact that those attending the April 28 meeting were invited by fellow pharmacists, not by the union, and that the union's demand for recognition, which was made after the meeting, specifically excluded supervisors.

It was upon this recitation of the evidence that the Court rejected the Board's finding as not based upon substantial evidence.

REASONS FOR GRANTING THE WRIT.

I.

It may be confidently said that the most important issue in the administration of the National Labor Relations Act today involves the establishment of collective bargaining rights without an election under Section 8(a)(5) of the Act.[2] The number of cases decided by the Board has been rising steadily.[3] Legal writing on the subject has been extensive[4] and promises to continue to be even more so.

Much of the renewed importance of so-called card check cases in recent years has flowed directly from *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), where this Court pointedly remarked that certification is not the only route to representation status. There is also this Court's ruling in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). As long as these doctrines stand as guiding beacons for the Board and the

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[2] We are indebted to Professor Lesnich's comprehensive article, Establishment of Bargaining Rights Without an NLRB Election, 65 *Mich. L. Rev.* 851 (1967), for his collection of the recent writings and controversies on the subject.

[3] Lesnich, *supra*, note 2, in which he states that his own study showed about a dozen such cases in 1964, twice that many the following year, and approximately 117 in 1966. The issue, with widely divergent results, has been before every one of the Courts of Appeals in substantial numbers. Counsel herein has studied more than fifty such cases in the various circuits since January 1, 1967 through April 30, 1968.

[4] For what Professor Lesnich fairly called a "diatribe" against reliance on authorization cards, see Comment, Union Authorization Cards, 75 *Yale L. J.* 805 (1966); see also, Card Checks and Employee Free Choice, 33 *U. Chi. L. Rev.* 387 (1966); Lewis, the Use and Abuse of Authorization Cards in Determining Union Majority, 16 *Lab. L. J.* 434 (1965); Loomis, Determination of Union Majority Status, 47 *Chi. Bar Record* 113 (1965); Sandler, Another Worry for Employer.

litigants who come before it, there will continue to be a plethora of authorization card cases which are, as we will undertake to show, being widely and differently construed by various courts of appeals to the confusion and consternation of both the Board and the litigants.

This Court's denial of certiorari during the October 1967 Term in *NLRB v. Crawford Manufacturing Co.*, ____ F.2d ____ (4th Cir. 1967), No. 1050; *Bryant Chucking Grinder Company v. NLRB*, ____ F.2d ____ (2d Cir. 1967), No. 1324; and in *Preston Products Company v. NLRB*, ____ F.2d ____ (D.C. Cir., 1967), No. 1367, may understandably result in some timidity on the part of future petitioners, including the Labor Board, in seeking review in authorization card cases. But this case is far different from the three set forth above, as there is no issue here of any unreliability concerning the cards, which was a major problem in all of those proceedings.

The thrust of this petition involves some complexities of the substantial evidence rule on the one hand, but on the other, reaches to a broad scope of issues that are inherent in most authorization card cases. Disposition of such cases by various courts of appeals in oddly variant and conflicting ways under the substantial evidence rule contributes to floundering and confusion, leaves judges and litigants continually confounded, and makes one who seeks enforcement of Board orders a player of a kind of legal Russian roulette.

Then, why, among the complexities and varieties of authorization card cases, is this one particularly suited for this Court's review?

II.

The variances in decisions between the reviewing courts of appeals is enormous. There has arisen a pronounced judicial hostility to the Board's authority in bargaining order cases. Judge Haynsworth, in his tour de force against authorization cards in *NLRB v. Logan Packing Company*, ____ F.2d. _____, 66 LRRM 2596, flatly stated, "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks." The Second Circuit, in *NLRB v. Flomatic Corporation*, 347 F.2d 774, 778, has branded a bargaining order as "strong medicine." The Court below cited *Flomatic, Logan*, a "notoriously unreliable method" phrase, and a series of other rulings rejecting Board bargaining orders in card check cases.

Growing judicial hostility[5] to what may be considered as "unreliable" and "strong medicine" makes the substantial evidence rule a pliable vehicle for setting aside

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[5] The Fifth Circuit, in recently refusing to enforce a Board bargaining order in *NLRB v. Southland Paint Company*, ___ F.2d ____, 68 LRRM 2169 (May 8, 1968), in commenting upon the Fourth Circuit's decision in *Logan Packing Company, supra*, claimed that the Fourth Circuit had taken the position that an employer is entitled to have a good faith doubt of a union's majority support when it is based on cards alone, except in the rare instance when the employer verifies the majority status himself and finds that it does in fact exist. The Fifth Circuit, in an opinion by Judge Wisdom, went on to say, "Although we find the arguments advanced in those opinions persuasive, at this time in this case it is unnecessary to go as far as the Fourth Circuit has gone." Judge Wisdom added a footnote 16 at this point, which said: "The Third, Eighth, Ninth and Tenth Circuits have not spoken recently on this issue, and in view of the rapid alterations in position in the recent cases, we do not rely on their earlier opinions."

a Board order when a reviewing court deems it advisable. What is substantial evidence to one reviewing court may be insubstantial to another. There may be even variances among different panels of the same Court of Appeals based upon who is sitting at the time.[6]

One needs only contrast the Ninth Circuit's ruling in *Retail Clerks Union, Local 1179 v. National Labor Relations Board,* 376 F.2d 186 (9th Cir. 1967), with that of the Second Circuit in *NLRB v. River Togs, Inc.,* 382 F.2d 198 (1967). The Ninth Circuit ordered the Board to compel an employer to bargain with the union with a majority of authorization cards where the employer's bad faith was established, not by commission of any unfair labor practices or unlawful attempts to undermine the union, but by a delay of a few days, which was found to be inconsistent with the "policy and purpose of Section 8(a)(5) of the Act and evidences employer rejection of collective bargaining principles." The Second Circuit found employer conduct of interference, interrogation, surveillance and threats no evidence of a lack of good faith doubt by the employer and refused to enforce the Board's bargaining order.

One may also compare the Tenth Circuit's ruling in *Furr's Inc. v. NLRB,* 381 F.2d 562, cert. den., 389 U.S. 840, where the Employer thought that the card majority was generated by union misrepresentation (but the bargaining order was enforced), with the Sixth Circuit's holding in *People's Service Drug Stores, Inc. v. NLRB,* 375 F.2d 551, or the Fourth Circuit's ruling in *NLRB v.*

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[6] For example, the Sixth Circuit enforced a Board order in *NLRB v. H & H Plastics Manufacturing Company,* ____ F.2d ____, 67 LRRM 2572 (Feb. 15, 1968), where judges different from those who sat on the instant case affirmed the Board's order on evidence that, from our review of that case, seems far less substantial than the undisputed facts in this case.

Crawford Manufacturing Co., ___ F.2d ___, cert. den., No. 1050, or *Logan, supra*, or a host of other cases, where employer misconduct was pronounced (where bargaining orders were not enforced).

To this point, we have asserted that the issue of bargaining based upon signed union authorization cards is the most important problem confronting the Labor Board and the courts in administration of the National Labor Relations Act at this time. Hostility to the Board's doctrines has produced a wide variety of appellate rulings, many of which are disposed of under the substantial evidence rule when this Court is understandably loath to disturb a lower court's supposed search of the record for substantial evidence, or lack of it. This, too, is a factor of considerable importance, as we shall set forth later.

III.

This case is particularly pertinent for review by this Court at this time because there are elements in it that should lead to a declaration of what is substantial evidence as a matter of law to support a Board order compelling an employer to bargain. This is, of course, applicable to the crucial situation when a majority is based upon authorization cards as against a contention that the employer had a good faith doubt of the existence of the numerical majority.

The Board, affirmed by the Court below, found that there was commission of such unfair labor practices in violation of Section 8(a)(1) as interference, restraint and coercion which were designed to undermine the Union's standing, status, or majority. This kind of interference may be contrasted with minimal violations which are not related to the Union's status and majority standing. The second important element in this case is that the

Union offered to establish its majority status before an impartial third party at a time when there was no question or no claim of any kind, nor was one ever raised, that the authorization cards were invalid or that their purpose was for any other reason than to establish the Union's right to bargain for the pharmacists. This issue is thus quite different from the 1967 term cases, where the controversy in all of them revolved around whether or not there was an existent majority because of misrepresentation or some cloud over the status of the cards. The first basic question here is whether, when these two factors are proved by substantial evidence on the record, as they were in this case, these combined factors are sufficient as a matter of law to meet the substantial evidence test to uphold a Board finding of a lack of good faith doubt.

There is even substantial authority for the proposition that violations of Section 8(a)(1), after a union has demanded recognition, are alone sufficient substantial evidence of a lack of good faith doubt on the part of the employer.[7] On the other hand, the Second Circuit in *River Togs, supra,* the Fourth Circuit in *Logan, supra,* and the Sixth Circuit in this case, have gone far to say that sub-

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[7] The First Circuit, through Chief Judge Aldrich, in *NLRB v. Purity Food Stores,* 354 F.2d 926 at 927, said: "By its clearly established 8(a)(1) violation it [the employer] is barred from asserting a good faith, although erroneous, doubt * * *." The Tenth Circuit, in *Furr's, Inc. v. NLRB,* 381 F.2d 562, Cert. den., 389 U.S. 840, made almost exactly the same holding. See also, *NLRB v. Southbridge Sheet Metal Works,* 380 F.2d 851 (1st Cir., 1967); *Lincoln Mfg. Co., v. NLRB,* ____ F.2d ____, 65 LRRM 2913 (7th Cir. 1967). The Fourth Circuit in *NLRB v. Overnite Transportation Co.,* 308 F.2d 279, at 283, through Judge Sobeloff, after referring to a course of employer conduct designed to violate Section 8(a)(1) after receiving a union demand for recognition, said: "This course of conduct is an absolute refutation of any good faith doubt on the part of the company." Judge Sobeloff's statement was regrettably rejected by Judge Haynsworth in *Logan, supra.*

sequent violations of Section 8(a)(1) of the Act are no evidence at all of a bad faith doubt by the employer as to the existence of a union majority.

The Board itself does not consider subsequent evidence of violations of Section 8(a)(1) as conclusive as to a lack of employer good faith doubt. Its definitive ruling in *Aaron Bros.*, 158 NLRB 1077, said: "Whether an employer is acting in good or bad faith in questioning a union's majority is a determination which of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."

Nor do we contend that Section 8(a)(1) conduct, regardless of its nature or gravity, is alone sufficient to support the finding of a lack of employer good faith doubt. We do believe, however, as the Tenth Circuit said in *Furr's, Inc., supra,* that "case law leaves no doubt that 8(a)(1) conduct is *cogent evidence* of a lack of good faith." (Emphasis supplied.) This is far different than saying, as the Second, Fourth and Sixth Circuits have done, that it is no evidence at all.

Thus, as a part of the substantial evidence standard, this Court can settle conflicts between the circuits and guide the Board and litigants by deciding whether evidence of Section 8(a)(1) violations which are designed to interfere with the Union's majority are either cogent evidence, some evidence, or no evidence at all tending to prove an employer's lack of good faith doubt.

But when the evidence of Section 8(a)(1) violations is added to the circumstances of a union request for an impartial third party card check, at a time when there is no question whatever raised as to the authenticity or purpose of the authorization cards, and this is rejected, then these

combined factors should establish as a matter of law the lack of employer good faith doubt. No court, until the Sixth Circuit in the case below, has ever rejected this composite of evidence as insufficient. The Eighth, Ninth, and Tenth Circuits have found these factors to be an unquestionable demonstration of an employer's lack of good faith doubt.

Perhaps the strongest statement of this principle has come in the Ninth Circuit's ruling in *NLRB v. Luisi Truck Lines*, ___ F.2d ___, 66 LRRM 2461 (9th Cir. 1967), when the Court said: "Even if Respondent has some doubt as to the majority status of a union, its entering upon an unlawful course of conduct in violation of Section 8(a)(1) and clearly directed at undermining whatever support the union had, as well as its failure to accept the union's offer of proof of its majority status, indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that Respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that no matter what the proper unit was, the union would not have a majority."

The Eighth Circuit, in *NLRB v. Ralph Printing & Lithographing Company*, ___ F.2d ___, 65 LRRM 2800 (8th Cir., 1967), made substantially the same holding. There were violations of Section 8(a)(1) in the case, and a refusal of the employer to submit authorization cards to a mutually acceptable third party to verify the union's claim of a majority. The Court said: "Their failure to give the union any opportunity to substantiate its claims of representation is inconsistent with the assertion of good faith." See also, *NLRB v. George Groh & Sons*, 329 F.2d 265 (10th Cir. 1964).

The importance of an acceptable standard for establishing substantial evidence to prove as a matter of law

a lack of good faith doubt on the part of an employer as to a union's majority, along with the conflicts between the reviewing courts, make this issue in this case worthy of this Court's review.

IV.

The second question presented, once the underlying factual foundations of the inquiry are substantiated, provides a powerful example of a gross misapplication of the substantial evidence rule. Cf. *NLRB v. Walton Manufacturing Company*, 369 U.S. 404 (1962). The evidence found by the Board in this case to establish the employer's lack of good faith doubt is not only substantial, but indeed is overwhelming. We shall first set forth only the probative facts which are undisputed and uncontradicted. A short summary of these critical factors is:

(1) There was no question as to the validity and the purpose of the cards, which were signed solely for representation and bargaining purposes. The employer had extensive knowledge of this purpose.

(2) The employees organized themselves, and only sought union representation after they had conducted a considerable campaign of their own, which demonstrated their desire for collective bargaining.

(3) There was unremitting hostility toward the union not contradicted or denied. Pharmacists were told that the company would never allow a union to be formed, no matter what it cost.

(4) There was an adamant refusal to deal with the union, no matter what the circumstances. Rivelis, one of the vice presidents, told the pharmacists the company would never deal with the union.

(5) The critical admissions against interest of the employer's own knowledge of the fact that union represented a majority after the demand was made should, without any other evidence, be sufficient to meet any substantial evidence test as to proof of a lack of good faith doubt. The admissions by two supervisors that the union had 19 signed cards at a time when that was exactly the correct number, as found by the examiner and the Board, was never contradicted, nor was there ever any evidence introduced to even seek to controvert this critical factor.

(6) The refusal to accede to a card check when the only issue involved was whether or not there existed a numerical majority was likewise uncontradicted. Nor was there any reason assigned by the employer at that time as to a doubt (J.A. 501a).

(7) The employer sought time in which to dissipate the union's majority. Kaye, the operational vice president, in seeking to persuade pharmacist Maza to desert the union and work with the employer, told him that the cards didn't mean anything and with his help there was time to change the signatures.

All of these facts are probative toward the establishment of a lack of good faith doubt on the part of the employer. Not a single one of them was contradicted or sought to be impeached in any manner. Thus, there was no body of evidence directly opposed to detract from the force of this evidence, as contrasted to the situation in *Universal Camera, infra,* where the examiner and the Board reached different conclusions on the evidence and the reviewing court was permitted to take into account the examiner's finding which detracted from the evidence utilized by the Board.

The Court, in its findings, ignored every one of the above circumstances except the violations of Section 8 (a) (1) and the refusal of the employer to accede to a card check. The Court of Appeals in turn relied upon other factors which, when subjected to a more searching analysis than this petition permits, are almost totally wanting in substance. The Court relied upon testimony of one supervisor, which was discredited by the examiner who saw the witness, that some of the pharmacists had told him they did not believe there was much support for the union.[8]

The Court relied upon a 1954 event when the same union requested recognition as bargaining agent for drug store clerical employees, and was later rejected in a National Labor Relations Board election. Judge Sobeloff succinctly disposed of this kind of argument in *NLRB v. Overnite Transportation Company*, 308 F.2d 279, at 283, when he said: "A union's unsuccessful attempts at organizing other branches of a company's operation may not be relied upon by an employer to refuse at a different branch either to recognize a union or at least to undertake some inquiry into the actual extent of the union's representation."[9]

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[8] Another panel of the same Court discounted this kind of evidence in *NLRB v. H & H Plastics Manufacturing Company*, ____ F.2d ____, 67 LRRM 2573 (Feb. 15, 1968) where two employees out of a group of 23 recanted their union support.

[9] A similar argument was found insubstantial by the Seventh Circuit in *NLRB v. Richman Bros. Co.*, ____ F.2d ____, 67 LRRM 2051 (1967), where there was a long history of rejection of unions by employees of the employer throughout the nation. The Second Circuit in *Textile Workers Union v. NLRB*, ____ F.2d ____, 66 LRRM 2751 (1967), did give some weight to this factor, citing four other cases to support his proposition. The Court, however, paying heed to *NLRB Overnite Transportation Company, supra*, recognized that experience at *other* locations afforded a possible basis for distinction.

The Court below cited the union's hurried procedure in seeking recognition so quickly after the signing of the cards.[10] The Court also cited the slim majority of the union as another factor tending to establish the employer's doubt of majority.[11]

The Court below cited a lack of clarity in the union's demand, stating that the demands were made only to "Lane Drug Company." The three stores in the case not located inside the municipal limits of the City of Toledo were formed into separate corporations, such as Lane's of Bowling Green, Inc., Lane's of Sylvania, Inc., and Lane's of Oregon, Inc. Of course, the union had no way of knowing the intricate corporate structure of the operation, since all of the stores operated as Lane Drug Company, functioned as one unit, had the same officers and same supervisors, and were approximately alike in every respect save physical location.

The Court also cited the employer's doubt of the correct unit composition, apparently because of the question of supervisory status of some pharmacists and a question of whether a pharmacist named Searle was a supervisor or managerial employee.[12]

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[10] We fail to perceive how this can in any manner detract from the efficacy the union's majority claims. It might as easily be considered positive strength.

[11] Apart from the fact that an employer often might not know the numerical extent of the union's claim (although here the evidence is undisputed that the employer actually knew that the union represented a majority that was not slim), one needs only an actual majority—not an overwhelming majority, or a substantial majority, or even a decisive majority. The Third Circuit, in recently affirming the Board in *NLRB v. Quality Markets Inc.*, ____ F.2d ____, 67 LRRM 2034 (Dec. 18, 1967), where the majority was 11 of 21 employees, gave no consideration at all to this factor in evaluating the employer's claim of good faith doubt.

[12] The employer's own representation petition, sworn to by its counsel, that the unit contained only 25 eligible pharmacists,

(Continued on following page)

We come, then, to what is substantial evidence when the record is viewed as a whole, including the body of evidence opposed to the Board's view. As we have shown, there was no evidence at all opposed to the enumerated factors supporting the Board's finding. The Court, as a basis for its holding there was no substantial evidence, looked to factors altogether separate. Is this proper, when to "ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence"? *NLRB v. Universal Camera Corp.*, 340 U.S. 474, at 488. Does taking into account the evidence opposed to the Board's view require that there be some conflicting evidence to specifically detract from that relied upon by the Board before a Board finding may be set aside? When undisputed Board evidence in and of itself is sufficient to sustain the inference of the fact in issue, does this not meet the test of substantiality?

Is this not a gross misapplication of the substantial evidence rule warranting review in and of itself? But is it not more important to re-state the principles of the rule in Section 8(a)(5) cases by defining what is meant

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(Continued from preceding page)

which is likewise uncontradicted, should alone be dispositive of such a fragile claim. The Fourth Circuit has previously said, in *Florence Printing Company v. NLRB*, 333 F.2d 289, at 291: "Even if the company entertained a doubt, it is no defense to a refusal to bargain charge where the unit is proper." The Seventh Circuit said in the recent *Richman Bros.* case, *supra*, that: "Where the deviation between the unit requested by the union and the unit believed appropriate by the employer is insubstantial and does not affect the union's majority, it cannot justify the employer in refusing to bargain. (citing cases) A proper course for the employer in those circumstances is to refuse to bargain with respect to those employees whose unit status is disputed, not to wholly refuse to bargain." The First Circuit has said in *NLRB v. Primrose Super Market of Salem, Inc.*, 353 F.2d 675, at 676: "It seems entirely justifiable to rule that an employer who was improperly seeking to discharge unionization must take its chances as to the appropriateness of the proper unit."

by the weight to be accorded that body of evidence opposed to the Board's view?

V.

This Court's restatement of the substantial evidence rule in *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), and *Illinois Central Railroad Company v. Norfolk and Western Railway Company*, 385 U.S. 57 (1966) appears far from different from what was applied by the Court below, or other reviewing courts in Labor Board authorization card cases. In *Consolo*, at 383 U.S. 607, 620, substantial evidence was defined as that which "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." In *Illinois Central*, at 385 U.S. 57, 69, this Court said again: "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

If indeed, substantial evidence is that which must be enough to justify, if a trial were to a jury, a refusal to direct a verdict, is not a Board finding of the fact of a lack of good faith doubt on the part of an employer eminently substantial when the probative facts relied upon are undisputed and uncontradicted? Does this not warrant "sending the case to the jury"? Are not the examiner and the Board, where they are in agreement, the ultimate jury which must decide the fact when a reviewing court, as a matter of law, could not deny them that privilege?

The divergence from the standards of *Consolo* and *Illinois Central* by the reviewing court below makes reliance upon substantial evidence a hazardous game, and is a further reason why this case, on its powerful facts, merits this Court's review.

CONCLUSION.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

JOSEPH E. FINLEY,
METZENBAUM, GAINES, KRUPANSKY,
FINLEY & STERN,
Attorneys for Petitioner Retail Store Employees Union Local 954.

SUPREME COURT, U. S.

FILED
JUN 26 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 232

RETAIL STORE EMPLOYEES UNION LOCAL 954,

Petitioner,

v.

LANE DRUG COMPANY,
a Division of A. C. Israel Commodity Corporation, Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc. and Lane's of Oregon, Inc.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

JOSEPH E. FINLEY,
METZENBAUM, GAINES, KRUPANSKY, FINLEY & STERN,
700 Union Commerce Building,
Cleveland, Ohio 44115,

Attorneys for Petitioner Retail Store Employees Union Local 954.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

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APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided March 29, 1968.)

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. The controversy in this case grows out of efforts to organize the pharmacists employed by Lane Drug Co., an Ohio corporation, and its three corporate affiliates, in seventeen drug stores [1] located in Toledo, Ohio and environs.

The union [2] sought to obtain recognition as exclusive bargaining representative of the pharmacists via the signed authorization card route rather than by means of a Board-conducted election.

The union representative attended a meeting of about twenty of the pharmacists which was called late in the evening of April 28, 1965, when sixteen pharmacists signed authorization cards.

The next day, on April 29, 1965, at 5:42 o'clock P.M., the union sent to Lane Drug Co. a telegram stating that it represented a majority of its pharmacists in greater Toledo and Bowling Green, Ohio stores, and requesting a meeting to negotiate a contract covering wages, hours and working conditions for all pharmacists in the above stores, except those who function in a supervisory capacity. The telegram was received by Lane Drug Co. on Friday, April 30th.

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[1] The eighteenth store, employing two pharmacists, was opened in Fostoria, Ohio, about two weeks after the union filed the unfair labor practice charge.

[2] Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO.

On the following Monday, May 3rd, the union, without waiting for a reply, filed with the Board an unfair labor practice charge against Lane, alleging a violation of Section 8(a)(5) of the National Labor Relations Act as amended, 29 U.S.C. § 151, et seq, for refusal to bargain, and also alleging a violation of Sections 8(a)(1) and 8(a)(3) of the Act. An amended charge was filed on June 11th.

On May 4th the union sent another telegram to Lane Drug Co. repeating its demand for recognition and offering to prove its majority through the facilities of an impartial third party, the Toledo Labor Management Citizens Committee.

Subsequent to the filing of a complaint, a hearing was conducted before the trial examiner, who rendered his decision holding that Lane and affiliated companies violated Section 8(a)(1) of the Act by interrogating their employees concerning their union activities or sympathies, by soliciting employees to survey and report to them the activities of other employees in behalf of the union, by promising benefits to pharmacist Nupp in order to have him to discontinue his organizational activities, by attempting to deal with strikers on an individual basis, and by stating that the companies would not recognize any union. The examiner expressly found, however, that Lane did not threaten the pharmacists with discharge or reduced hours in reprisal for union affiliation or activities. The examiner further found that Lane violated Section 8(a)(3) of the Act by discharging pharmacist William P. Nupp, and violated Section 8(a)(5) of the Act by refusing to bargain with the union on April 29th and thereafter. He recommended that pharmacist Nupp be reinstated with back pay, that Lane be ordered to bargain with the union, and that appropriate notices be posted.

The Board, in reviewing the examiner's decision, upheld his findings as to Section 8(a)(1), 8(a)(3) and 8(a)(5) violations, but found that he was in error in holding that Lane violated the Act by refusing to bargain in response to the April 29th telegram, because on that date the union with only sixteen cards, did not in fact represent a majority of the appropriate unit of thirty-two pharmacists.[3] The Board held, however, that on May 4th, when the union repeated its demand for recognition, it had acquired an additional card and therefore had a majority of one; that Lane did not have a good faith doubt about this majority; and that Lane was therefore in violation of Section 8(a)(5) by refusing to bargain with the union. The Board pointed out a number of errors in the examiner's decision, which it termed "discrepancies," but held that they did not affect his ultimate conclusion or its concurrence therewith.

Upon consideration of the record as a whole, we agree that there was substantial evidence to support the Board's findings of Section 8(a)(1) violations in the respects hereinafter pointed out, and the findings with respect to the 8(a)(3) violation, but we do not agree that there was substantial evidence to support its finding as to a Section 8(a)(5) violation.

Lane owned and operated a chain of fourteen drug stores in the Toledo area. Its affiliated companies, as indicated by their respective names, operated three additional stores in Sylvania, Bowling Green, and Oregon,

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[3] The Examiner had excluded from the bargaining unit pharmacists Waldman and Searle. The Board held that Waldman, a part time employee, should not have been excluded, and that Searle was properly excluded because of lack of community of interest with the other pharmacists. This was not the reason given by the Examiner. By excluding Waldman from the unit, the union lacked a majority.

Ohio. The eighteenth store was opened on May 18, 1965, at Fostoria, Ohio.

A stipulation was filed at the hearing before the examiner, to the effect that the four separate corporations constituted a single employer within the meaning of Sections 2(6) and (7) of the Act. This was because the corporations had substantially the same officers and directors, with the President and Vice Presidents exercising substantial control over their operations and having centralized purchasing, warehousing and payroll systems. The General Manager of the stores, Pethke, was stationed at Toledo and under him were two nonpharmacist supervisors, Wagenman and Willis, each supervising about one-half of the stores. In each store there was one manager and one assistant manager, some of whom were pharmacists, and some were not. A store manager and assistant manager work alternate shifts, so that one of them is in the store at all times.

Ohio law requires pharmacists to be graduates of a recognized school or college of pharmacy, to serve for one year as an intern in a drug store under the supervision of a registered pharmacist, and to pass an examination conducted by the State Board of Pharmacy, in order to obtain a Certificate of Registration. Ohio Rev. Code § 4729.08. The law further provides that a retail drug store shall be "in full and actual charge" of the registered pharmacist. Ohio Rev. Code § 4729.27.

The leader in the organizational movement was pharmacist Nupp, who had been in the employ of Lane since 1961. In the latter part of 1964 Nupp contacted a substantial number of the pharmacists, including pharmacist-managers and assistant managers, to ascertain whether they were interested in forming an organization to deal with the company concerning working conditions. He

learned that there was considerable sentiment toward formation of some type of an organization, but there was a difference of opinion as to whether there should be a union "because of professional reasons."

Nupp testified that Vice President Kaye visited him twice at the store where he worked, shortly before Christmas of 1964. Kaye told Nupp that he knew of his organizational efforts and asked him the reason for such activity. Nupp detailed some of the complaints of the pharmacists and Kaye said he would discuss them with the men but that he thought they should bargain only on an individual basis. Kaye told Nupp that he liked him and would like him to become manager of a newly opened store, and that he would prefer that Nupp not continue his efforts to organize a union. Nupp said he was not interested in becoming a store manager. Kaye told Nupp, in a "cynical" tone according to Nupp, that he [Nupp] did not have to worry about losing his job for what he had done. At the second meeting Kaye repeated substantially the same statements but Nupp did not testify as to any cynicism in this conversation. Kaye added that a pay increase for Nupp could be arranged and that he also might obtain an interest-free loan.[4]

Kaye also interviewed pharmacist Eisenhauer and suggested that Kaye be called on the telephone any time a pharmacist had a grievance.

In January, 1965, Kaye suggested that Nupp write to the Cleveland office and request a $15,000-loan on his own terms. Kaye further told Nupp that he would look into the complaints and would discuss them with the pharmacists. He asked Nupp not to discuss any store

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[4] Nupp's home was mortgaged in the amount of fifteen thousand dollars. He was interested in obtaining a loan from the company in order to pay off his mortgage.

problems with fellow employees, but to call him [Kaye] or Manager Pethke. Nupp told Kaye that what Kaye said made him quite happy and that he was satisfied with Kaye's assurances.

After this meeting, Nupp discontinued his organizational activities, and in February, 1965, he made application by letter to the company for a $14,000-loan. In the letter he stated that he and his wife thought it would be more advantageous for them to remain in Toledo rather than go to California. Several weeks later Kaye told Nupp that the company would loan him only $4,500, which Nupp stated was satisfactory; but he nevertheless resumed his organizational activities. He and three other pharmacists held a meeting, at which he was authorized to contact local unions. Around April 10th General Manager Pethke told Nupp his application for a loan had been denied; that he [Nupp] was a trouble maker; and that Pethke would prefer that he leave the company. Nupp did not leave.

In the middle of April, Nupp contacted the union and arranged a meeting for the 28th of April. Eighteen to twenty pharmacists, including Assistant Manager Rettig, were invited to attend the meeting. There was some interrogation of two pharmacists by supervisors concerning the meeting. In one interrogation Supervisor Portteus told pharmacist Maza, "If I were you, I wouldn't get mixed up with this union activity that Bill Nupp is trying to start."

On April 28th, shortly before closing time around 9:30 p.m., Supervisor Willis discharged Nupp, giving as a reason that another pharmacist wanted to transfer to his store, said pharmacist having been a manager of Store No. 3. The discharge of Nupp was the subject of considerable discussion at the meeting of pharmacists held on April 28th, and undoubtedly had some impact on in-

fluencing the sixteen pharmacists to sign the union cards that evening.

After the two telegraphed demands of April 29th and May 4th, the filing of an unfair labor practice charge by the union on May 3rd, and other intervening activities by Lane and the union, Lane wrote to the union on May 12th expressing doubt as to its majority status; and on the same day Lane filed a representation petition with the Board for all pharmacists, except supervisors, employed by it at its drug stores in Toledo and vicinity.[5]

Another meeting of about twenty pharmacists was held on May 13th and they voted to go on strike, which strike lasted for about two weeks. Sixteen pharmacists picketed about ten drug stores. During the strike additional contacts were made with pharmacists by supervisors, requesting that they deal with management individually. The president of the companies wrote to the pharmacists suggesting that if they had problems they should talk with him directly, instead of through a go-between. He also stated that he would not talk to a union organizer or outsiders.

Section 8(a)(1) Violations.

The employer has a right to talk with his employees and to express his views as to whether or not they should join a union. *Jervis Corp. v. NLRB*, ____ F.2d ____ (6th Cir. 1967). This right of free speech prevails, however, only so long as the interrogation is noncoercive. *NLRB v. Welsh Industries, Inc.*, 385 F.2d 538 (6th Cir. 1967).

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[5] Lane's petition was later withdrawn. On August 18, 1965 another representation petition was filed in behalf of all four corporate employers. The Board denied this second petition on the ground that an unfair labor practice charge against the companies was pending.

The interrogation should be viewed in the context that the pharmacists were all college graduates, duly licensed to practice their profession. They had no difficulty in getting employment at drug stores. Some of them worked for other employers. In the light of this fact it is interesting to note that the examiner found that no pharmacist had been threatened with discharge or shortening of his hours of work. The burden was upon the General Counsel to prove that the interrogation was coercive. In our opinion he did not sustain that burden.

The pharmacists were, however, promised benefits if they would deal with the employer directly. The offer to pharmacist Nupp of a loan and an increase in salary is evidence of this. They were asked to prevail on other employees to deal directly with the employer. The employer told pharmacists that he would not deal with the union. The employer's conduct, in our opinion, constituted an interference with the employee's right to organize, guaranteed under Section 7.

We conclude that substantial evidence supported the Board's finding as to Section 8(a)(1) violations in the respects above noted. *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951).

Section 8(a)(5) Violation.

The findings of violation of Section 8(a)(5) present the important question of whether the employer had a good faith doubt about the union's representation of a majority of employees when the demands of representation were made. If the employer had such a doubt it cannot be found guilty of unlawfully refusing to recognize the union, even though the union actually represented a majority of the employees. *NLRB v. H & H Plastics Mfg. Co.*, ____ F.2d ____ (6th Cir. 1968); *Peoples Service Drug*

Stores Inc. v. NLRB, 375 F.2d 551 (6th Cir. 1967); *Pizza Prods. Corp. v. NLRB*, 369 F.2d 431 (6th Cir. 1966).

Contrary to the findings of the trial examiner and the Board that there was no reason for Lane to doubt the majority status of the union, we think that several bases for a good faith doubt, which have been judicially recognized, did in fact exist at the time Lane was found to have violated section 8(a)(5). It is clear that the burden of proof was upon the General Counsel to establish the lack of good faith of Lane in refusing to bargain. *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2nd Cir. 1967); *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936, 939-40 (5th Cir. 1965); *Aaron Bros. of Cal.*, 158 NLRB 1077 (1966).

The first basis for a good faith doubt is the fact that Lane officials, as a result of investigations after the first demand, had received indications from several of its pharmacists that "not many" of them were interested in the union. Supervisor Willis, who had been instructed to make the investigation shortly after the first demand, talked with pharmacists Yarnell, Newhard and Langdon, who had also talked with other pharmacists, and they advised Willis in substance that they did not think many of the pharmacists were interested in the union. Willis testified that these responses were typical of others which he received from pharmacists and store managers. Willis reported to the General Manager that only a few of the pharmacists were interested in the union; that a majority of them were not interested; and that some who signed indicated that they felt they should, or had to. This testimony was not controverted.[6]

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[6] The examiner summarized this testimony in his decision but he thought Willis was "unnecessarily evasive and vague about these conversations, incredibly testifying that he 'more or less listened to what they had to say about it' and that he 'didn't

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A further reason for Lane to doubt the majority claimed by the union, not discussed by either the examiner or the Board, is the fact that on January 15, 1954, the same union had made a written demand to Lane for recognition as bargaining agent for some of its clerical employees, and represented that it had been designated and authorized by a majority of the employees. Lane petitioned the Board for an election, which the Board granted. The result of the election was that out of a total number of 191 eligible voters, the union received only 28 votes, with 154 employees voting against the union. In determining the good faith of the employer, its previous experience with union cards or elections is a factor which is considered. *Peoples Service Drug Stores Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965); *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638 (1st Cir. 1959).

The union was interested in becoming collective bargaining representative of the pharmacists, if this could be accomplished without an election, and apparently in a hurry. The first telegram demanding recognition was sent after business hours on April 29th and was received by the company on Friday, April 30th. Although the company did begin an immediate investigation, the union did not wait for a reply, and on the following Monday it filed an unfair labor practice charge, alleging a Section 8(a)(5) violation for failure to bargain, along with violations of Sections 8(a)(1) and 8(a)(3). In light of the union's erroneous claim of a majority in 1954, and the hurried procedure of the union in attempting to gain recognition

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really do any questioning as to what took place.' " We see nothing vague, evasive, or incredible about the testimony of Willis concerning what the pharmacists had told him and his report to his superior.

on this occasion, it was not unreasonable for Lane to look upon the union's claim of representing a majority of its pharmacists with skepticism, and these two considerations would provide further reason for a good faith doubt.

When the union made its first telegraphic demand, it did not have a majority. It was only by erroneously excluding from the unit a part time employee who the Board found should have been included, that the examiner was able to find a majority existed on April 29th. A few days later the union secured another card and made its second telegraphic demand, which the examiner and the Board both found gave the union a majority of one—a slim margin, indeed. The existence of a majority by a slim margin is also a factor which must be considered in determining whether a good faith doubt existed. *NLRB v. Great Atl. & Pac. Tea Co., supra.* See also *Pizza Prods. Corp. v. NLRB,* 369 F.2d 431, 438 (6th Cir. 1966).

Neither of the bargaining demands (the telegrams of April 29th and May 4th) clearly designated which stores or pharmacists the union claimed to represent. This lack of clarity was an additional reason for Lane to doubt in good faith that the union had the majority that it claimed. The two demands were addressed only to Lane Drug Company. While they mentioned Bowling Green, the demands were not addressed to Lane's of Bowling Green, Inc., which owned and operated the Bowling Green store. Nor were the demands addressed to Lane's of Sylvania, Inc., or Lane's of Oregon, Inc., which owned and operated stores in those cities. The employer was supposed, apparently, to divine whether the union intended to include them.

The Board ruled that all managers and assistant managers-pharmacists were supervisors and hence not includable in the bargaining unit. This was clear after the Board

made the ruling, but it was not too clear at the time the demands for recognition were made. Ohio law seems to require that pharmacists be "in full and actual charge of the store." Ohio Rev. Code § 4729.27. This would appear to require that the pharmacists on duty at the time be in charge of the store.

When a manager-pharmacist was relieved by his assistant, the latter was in charge of the store. None of the manager-pharmacists or assistant managers had power to hire or discharge employees, but they were authorized to make recommendations in that regard. The stores were all supervised by two general supervisors, Wagenman and Willis, who visited them daily. One pharmacist testified that the difference between a manager and a nonmanager was that the former had keys to the store and the latter did not. There was no difference in compensation.

One of the pharmacist-managers was invited to attend the organization meeting of April 28. He must have been considered eligible to attend and participate in the union. There was substantial interchange of employees among the stores. There was the problem of whether part time pharmacists, pharmacist-interns, and pharmacists who were on sick leave, but who were still carried on the employer's books as employees, were eligible to be included in the unit. There was a question of eligibility of pharmacist Searle to be included in the unit. Searle was stationed at the warehouse, and his chief function was to order drugs, but he also served in stores as a pharmacist, in emergencies. There was also a question whether pharmacists who left the employ shortly after the demands, and pharmacists who were employed shortly thereafter in the newly opened store, should be included or excluded from the unit.

In addition to demonstrating a further basis for a good faith doubt, all of these questions suggest that the

best procedure to be followed in a case of this kind is a Board-conducted election, where the bargaining unit would be determined by the Board and the eligibility of employees fixed at one time, the date of the election. *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964).

Under the circumstances of this case the employer is placed on the horns of a dilemma. If a majority exists and he refuses to recognize it, he violates Section 8(a)(5). This was the ruling of the Board in the present case. On the other hand, if the employer recognizes a union which does not in fact represent a majority, he violates Section 8(a)(1) and 8(a)(2). The Supreme Court so held in *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961), and held further that the employer's good faith was not a defense. Mr. Justice Clark, who wrote the opinion for the Court, said:

> "More [than a Section 8(a)(2) violation] need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith." *Id.* at 739.

It is contended that failure of the employer to accede to the union's offer for a check of authorization cards by a neutral third party, is proof of the employer's bad faith. This is not necessarily so. The use of such cards has been held by the Board to be a "notoriously unreliable method of determining the majority status of a union." *Sunbeam Corp.*, 99 NLRB 546, 550, 551 (1952). An order to bargain, based thereon, has been described as "strong medicine" to be applied only "with restraint". *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78-79 (2nd Cir. 1965). The offer of a check of authorization cards "does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge." *NLRB v. Great*

Atl. & Pac. Tea Co., 346 F.2d 936, 942 (5th Cir. 1965). See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967); *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965).

The fact that the employer committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) is not of itself sufficient reason to negative a good faith doubt. *Peoples Service Drug Stores Inc. v. NLRB, supra*, at 556. See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967). An 8(a)(1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with a belief in the majority status. An order to bargain, based on an 8(a)(1) violation, will not be enforced. *NLRB v. River Togs, Inc.*, 382 F.2d 198, 207 (2nd Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2nd Cir. 1965).

Finally, the employer urges bias on the part of the trial examiner in his rulings at the hearing, in crediting the testimony of witnesses of the General Counsel most of the time, and in crediting the testimony of the witnesses of the employer hardly any of the time, and also urges bias in the use of intemperate language in his decision. We have considered these claims, but in our judgment they are not sufficient to establish bias.

The order of the Board is enforced with respect to the Section 8(a)(1) violations, approved herein, and enforced with respect to the Section 8(a)(3) violation. Enforcement is denied with respect to the claimed Section 8(a)(5) violations.

ORDER OF THE COURT OF APPEALS.

(Dated: March 29, 1968.)

On petition to review, set aside and on cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board is enforced with respect to the section 8(a)(1) violations, approved in the opinion, and enforced with respect to the section 8(a)(3) violation. Enforcement is denied with respect to the claimed section 8(a)(5) violations.

No costs awarded. Rule 23(4).

Entered by order of the court.

CARL W. RUESS, *Clerk.*

APPENDIX B.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On April 26, 1966, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor

practices and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondents' exceptions. The Charging Party filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the Trial Examiner's findings,[1] conclusions, and recommendations, as modified herein.[2]

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[1] We note the following discrepancies in the Trial Examiner's Decision, which do not affect his ultimate conclusions or our concurrence therewith, as modified herein: (1) Although the Respondents did not admit in their answer that Assistant Store Manager Rettig (Reddig) is a supervisor, as the Trial Examiner stated, the record establishes that Rettig is a supervisor, as the Trial Examiner found. (2) Assistant Store Manager Dittman's conversation, about a week before April 28, was with pharmacist Nemetz, and not with pharmacist Molnar, as the Trial Examiner stated. (3) The Trial Examiner, in one instance referred to an unlawful refusal to bargain as a violation of Section 8(a) (3), instead of Section 8(a) (5) of the Act. (4) We find that the conversation between Vice President Kaye and pharmacist Maza, in which Kaye admitted knowing there were 19 pharmacists for, and only 10 against, the Union, occurred on May 9, and not on May 2, as found by the Trial Examiner, for the following reasons: (a) Maza, whom the Trial Examiner credited, testified that it took place on either May 2 or May 9, but in any event on the Sunday following the second scheduled Union meeting which the record indicates was held on May 7; (b) Kaye failed to testify;

(Continued on following page)

1. The Trial Examiner found, and we agree, that Respondents violated Section 8(a)(1) of the Act by coercively interrogating employees, promising them economic benefits, enlisting employees to engage in surveillance and to dissuade other employees from supporting the Union, soliciting employees to deal directly with Respondents instead of through a union bargaining representative, and threatening them with economic detriment for continuing their union affiliation or collective-bargaining endeavors.

2. The Trial Examiner also found, and we agree, that Respondents discriminatorily discharged pharmacist William P. Nupp on April 28, 1965, in violation of Section 8(a)(3) and (1) of the Act.

3. The Trial Examiner found that the Union represented a majority of 16 pharmacists in an appropriate unit of 31 pharmacists at the time of its original request for recognition and bargaining on April 29, 1965, and that Respondents violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on and after that date. In finding that the appropriate unit consisted of 31 pharmacists, the Trial Examiner excluded pharmacists Searle and Waldman.

Although we agreed with the Trial Examiner's conclusion that pharmacist Searle is properly excluded from the unit, we do not believe the record supports the Trial

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(Continued from preceding page)

and (c) we find no merit in Respondents' contention that Kaye was in Oxford, Ohio, on May 9, and therefore could not have been in Toledo, as this contention is based solely on the testimony of Vice President Rivelis, who was not credited in other respects by the Trial Examiner, and there is no showing that Kaye could not, at different times on May 9, have been in both cities, which are approximately 200 miles apart.

[2] The Respondents' request for oral argument is hereby denied as, in our opinion, the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Examiner's finding that Searle is a supervisor or managerial employee. The only evidence in the record which suggests that Searle is a supervisor is a notice to Respondents' pharmacists posted in its pharmacies more than 2 years ago setting forth general prescription-filling practices and techniques and signed by Searle over the designation "Chief Pharmacist." This designation alone is not sufficient to establish that Searle is a supervisor. Unlike unit pharmacists who fill drug prescriptions in Respondents' retail stores, are supervised by store managers and assistant managers, and who work 88 hours, including Sundays, during 2-week pay periods, Searle works a regular 48 hour, 6-day week, exclusive of Sundays, under the supervision of General Manager Pethke, reviewing and determining appropriate drug merchandise supply levels at Respondents' central drug warehouse which is geographically separate from Respondents' retail drugstores. Once a year Searle visits each retail drug store in Respondents' chain to inventory drug levels. In ordering drugs for Respondents' warehouse, Searle fills out requisitions which are then reviewed by Pethke and forwarded to Respondents' headquarters in Cleveland where they are again reviewed, and sometimes modified, before being sent to drug manufacturers. Searle only occasionally orders drugs directly from drug manufacturers. In these circumstances, we do not agree with the Trial Examiner that Searle is a managerial employee. However, as Searle's geographical location, hours of work, supervision, and duties are different from those of unit pharmacists, we find that he lacks a sufficient community of interest with those in the unit, and we shall, therefore, exclude him.

The Trial Examiner excluded pharmacist Waldman as a seasonal casual employee. We disagree. The record indicates that from 1957 to 1965 Waldman has regularly

worked a substantial number of hours for Respondent in a part-time capacity during winter months from September to April. While employed as a pharmacist, Waldman receives the same pay as other pharmacists and is generally subject to the same working conditions. Although Waldman, pursuant to his usual employment pattern, left Respondents' employ on April 4, 1965, we find that he has a reasonable expectancy of future employment with Respondents and, contrary to the Trial Examiner, that he has a sufficient community of bargaining interests with other unit pharmacists to warrant his inclusion in the unit.

Accordingly, we find that on and after April 29 there were 32 pharmacists, including Waldman, in the unit. As the Union had valid authorization cards from only 16 pharmacists when it initially demanded recognition and bargaining on that date, it did not represent a majority, and the Respondents' refusal to bargain at that time was therefore not unlawful. However, as the Union obtained an additional card on May 3, and renewed its request for recognition and bargaining on May 4, we find that the Respondents' failure to recognize and bargain with the Union on and after May 4 was, as alternatively found by the Trial Examiner, and for the reasons given by him, in violation of Section 8(a)(5) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondents, Lane Drug Co., Division of A. C. Israel Commodity Corporation; Lane's of Sylvania, Inc.; Lane's of Bowling Green, Inc.; and Lane's of Oregon, Inc.; their respective officers, agents,

successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Sep. 15, 1966.

FRANK W. McCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*
(SEAL) *National Labor Relations Board.*

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

This case was heard before me in Toledo, Ohio, on August 25-September 2, 1965, on complaint of General Counsel of the Board [1] alleging, and answer, as amended, of Respondents (also referred to as Respondent, Lane(s), and Employer) denying, violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. Sec. 151 *et seq.*, as amended ("Act"). All parties appeared and were represented throughout the hearing by counsel, who were afforded full opportunity to present their evidence and contentions,[2] examine and cross-examine witnesses, file briefs, and propose findings of fact and conclusions of law. Subsequent to the hearing, time therefor having been granted and extended, briefs were

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[1] Issued through the Board's Regional Director for the Eighth Region on June 17, 1965, upon charge and amended charge filed by the above Union on May 3 and June 11, 1965. Unless otherwise specified, all dates are 1965.

[2] As the record will disclose, at the outset of the hearing Respondents moved to dismiss the complaint or, in the alternative, to disqualify W. R. Griesbach, Esq., counsel for General Counsel, from trying the case on behalf of General Counsel, upon the ground that Mr. Griesbach had investigated or participated in the pretrial investigation of the case. For reasons apparent from the record, I denied the application as being without merit.

received, which, together with the evidence, have been carefully considered.

Upon the entire record [3] and my observation of the witnesses, I make the following:

FINDING OF FACT.

I. RESPONDENTS' BUSINESS; LABOR ORGANIZATION INVOLVED.

Respondents, all Ohio corporations with a common principal office in Cleveland, Ohio, have at all material times been engaged in the operation of retail stores for the sale of prescription and other drugs and sundry items in and around Toledo, Ohio. Respondent Lane Drug Co., Division of A. C. Israel Commodity Corporation operated 14 such stores, with annual retail sales receipts exceeding $500,000, and annual receipt of over $50,000 worth of goods directly in interstate commerce from locations outside of Ohio, to its places of business in Ohio; Respondent Lane's of Sylvania, Inc., operated such a store in Sylvania, Ohio, with annual retail sales receipts exceeding $100,000; Respondent Lane's of Bowling Green, Inc., operated such a store in Bowling Green, Ohio, with annual retail sales receipts exceeding $100,000; and Respondent Lane's of Oregon, Inc., operated such a store in Oregon, Ohio, with annual retail sales receipts exceeding $100,000.

Respondents' stores are operated, managed, advertised, and represented to the public as a single chain of drugstores under the names Lane, Lane's, or Lane's Discount Drug Stores, with a substantial interchange of employees among the stores. There is a central management and supervisory organizational hierarchy for the stores,

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[3] Hearing transcript corrected in accordance with order on notice of trial examiner dated April 1, 1966.

including centralized purchasing, warehousing, and payroll systems, and a single General Manager and District or Area Supervisors. The presidents, vice-presidents, treasurers, secretaries, and directors of the corporations are the same individuals,[4] with the president and vice-president exercising substantial control of the chain's labor relations policies; and there is a large degree of common ownership and control of the corporations.[5]

I find that at all material times Respondents have been and are affiliated businesses and a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I find that at all material times the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.[6]

II. THE ALLEGED UNFAIR LABOR PRACTICES.

A. Issues.

In essence, the issues here are (1) whether Respondents unlawfully interfered with, restrained, and coerced their pharmacist employees in their exercise of protected concerted activities under the Act, around the early part of 1965 (including interrogation; promises of economic benefits for refraining from union organizational activity and for dealing with Respondents directly instead of bargaining collectively; threats of economic detriment and reprisal in the event of persistence in union organizational activity or affiliation; and attempts to destroy the

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[4] With the sole exception of Lane Drug Co., which has an additional vice-president, Pethke, General Manager of the chain.

[5] Based essentially upon Respondents' admissions as to portions of allegations of the complaint; stipulated facts (Gen. Couns. Exh. 4); Gen. Couns. Exhs. 9A, 9B, 9C, and 9D; and testimony of Respondent's General Manager Pethke.

[6] Respondents' denial relative to this allegation of the complaint was withdrawn at the hearing.

Union's representative status through dissipating its majority); (2) whether Respondents unjustifiedly refused to recognize and bargain collectively with their pharmacists' duly designated Union bargaining representative; and (3) whether Respondent discharged its Pharmacist Nupp for his role as leader of the union organizational activity. Respondents deny any violation of Section 8(a)(1), (5), or (3) of the Act.

B. Background.

At the times here material (late 1964-early 1965), Respondents operated a chain of retail "discount drug stores" in and around Toledo, Ohio * * * 14[7] within Toledo and 3 in contiguous or neighboring Ohio communities; viz, Sylvania,[8] Bowling Green,[9] and Oregon.[10, 11] As already indicated and found, these 17 stores were held out and operated as a chain, with common central facilities, officials, management, and policies including labor relations policies, and with systematic interchange of employees. The Lane drug chain (and all of Respondent corporations) is headed by Sidney Amster, its President, who oversees its operations to a degree personally.[12]

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[7] I.e., Stores Nos. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, and 19, precise locations shown on map, Gen. Couns. Exh. 17.

[8] I.e., Store No. 18 (later redesignated Store No. 30).

[9] I.e., Store No. 17 (later redesignated Store No. 20).

[10] I.e., Store No. 1 (later redesignated Store No. 40).

[11] Sylvania and Oregon are Lucas County, Ohio townships contiguous to Toledo; Bowling Green, in Wood County, is 23 miles from Toledo. Respondent's drugstore in Maumee (Store No. 2), Lucas County, is 10 miles from Toledo.

[12] This is apparent from the testimony of various witnesses, including Respondents'. For example, Respondents' General Manager Pethke replied in the affirmative to the question by Respondents' counsel as to whether it is "general policy * * * that all decisions of any major magnitude are made in Cleveland, Ohio by Mr. Amster personally."

Amster's son-in-law Dr. George Kaye, a dentist, is Vice-President and Treasurer of the chain, devoting his attention primarily to personnel and real estate, while his brother-in-law David Rivelis, likewise a Vice-President, concentrates on administration and merchandising. Not here involved are another Vice-President, Charles R. Crosby, and Benton Cohen, Secretary. General Manager of the Lane Drug chain, charged with general supervision of the day-to-day operations of the stores, is Alvin Pethke, who is also a Vice-President of Lane Drug Co. Neither Amster, Kaye, nor Rivelis is a pharmacist, nor apparently is Pethke, nor is there any indication that any other of those named is.

Functioning directly beneath General Manager Pethke (who is answerable to Amster, Kaye, and Rivelis) in the Lane Drug enterprise are District or area Supervisors Wagenman and Willis, each charged with operational supervision of about half of the stores. Each of the stores is run by a Store Manager and Assistant Manager, who report to either District Supervisor Wagenman or Willis. Some of the Store Managers and Assistant Managers are pharmacists, some are not. It is apparent from the evidence dealing with their responsibilities and activities, detailed *infra*, that not only the Lane executives named above, but also the Store Managers and Assistant Managers are supervisors [13] within the meaning of Section 2(11) of the Act, as here found.

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[13] Indeed, this is so conceded by Respondents in their answers in relation to two Assistant Store Managers named in paragraph "5" of the complaint, whose responsibilities and activities there is no reason to assume differed substantially from those of other Store Managers and Assistant Managers.

C. Interference, restraint, and coercion.

A tabular chronology of principal events to be described is annexed as *Appendix A*.

November-December, 1964.

Union organizational activity among Respondents' pharmacists commenced in November-December, 1964 under the stimulation and continued leadership of Lane Pharmacist William Nupp of Store No. 18 (Sylvania). Nupp, an Ohio registered professional Pharmacist, entered Respondent's employ in August, 1961, and was initially assigned to Store No. 12 (Woodville Road), transferring at his own request in January, 1964 to Store No. 18 (Sylvania), where he continued to work until his discharge in April, 1965 under circumstances to be set forth. I find no substantial credible evidence of significant adverse employment history on the part of Nupp in his three years of employment with Respondent antedating his activity in the union organizational efforts to be described. There is no doubt that at all material times Nupp was the organizer and leader of the union organizational activity among Lane pharmacists, and I so find. There being substantial indication, in part detailed below, that Respondent was more or less contemporaneously apprised and fully aware of Nupp's activities in this regard, I further find that the fact that Nupp was the leader of union organizational activities among Lane pharmacists at all times here material was fully known to Respondents.

In November-December, 1964, Nupp [14] contracted 20-25, or a substantial proportion, of his fellow-pharma-

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[14] Assisted by fellow pharmacists Molnar, Nemetz, and Ritner; later by still others, as will be shown.

cists,[15] with a view toward organizing them for collective bargaining,[16] ascertaining their sentiment in that regard to be favorable.[17] Shortly before Christmas (1964), Respondent's Vice-President Kaye visited Store No. 18 (Sylvania), where Pharmacist Nupp was employed, and asked Nupp to accompany him to the back room. There he had a private conversation [18] with Nupp, informing him that he (Kaye) understood that Nupp was:

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[15] Including even some pharmacist Store Managers and Assistant Managers (Schmick and Rettig at Store No. 1).

[16] Involving grievances such as long hours, holiday work, inadequate pay, poor job security, no retirement provision, unsatisfactory vacations, and no or inadequate lunch time.

[17] Established by credited testimony of Nupp, corroborated in part by Nemetz and Eisenhauer.

[18] Nupp testified that although Respondent's Vice-President Rivelis accompanied Kaye into the store, Rivelis was not present during Kaye's ensuing conversation with Nupp in the back room. Rivelis testified that in Christmas week of 1964 Kaye and he visited all of the Lane stores, including Store No. 18, and that he (Rivelis) was present during a conversation between Kaye and Nupp at or near the counter between Nupp's waiting on customers. According to Rivelis, the conversation was "about general conditions" and "Nupp brought up the idea that he had grievances against the firm, that he had spoken to some of the other fellows over the phone in the course of his duties, and in checking on Rx's, and some of the fellows had some dissatisfaction with regard to overtime, not being paid for overtime or not getting the time off for overtime. At that time Dr. Kaye said he was surprised to hear this but he would check it out." According to Rivelis, Kaye also reminded Nupp of "what the Company has done for the pharmacists," including hospitalization, and informed Nupp at this time of emergency "loans to several individuals." Also according to Rivelis, Kaye indicated to Nupp that he would check into these matters by contacting other pharmacists so as "to find out what their gripes were, if any" and "try to take care of * * * them." Rivelis insisted that he had "no recollection whatsoever" as to the time of day when this occurred. Called by General Counsel as a rebuttal witness, Store No. 18 Pharmacist Newhard, 4 years at that store and still in Respondent's employ and not a Union card signer, swore unequivocally that when Kaye and Rivelis visited that store just before Christmas of 1964, he (Newhard) was just about to be relieved by Nupp at the 1 p.m. shift change, and Kaye asked him

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"organizing the pharmacists in a union, and he * * * wanted to know why we were doing this, and I [Nupp] said * * * that the pharmacists felt that the only way they thought they could solve their problems with the Company and could get the benefits that were due them was through some type of organization, and Dr. Kaye wanted to know what the complaints were * * *. I went through the grievances that the men had. I told him that they wanted an insurance plan, that they wanted a pension plan, that they wanted some improvements on their sick pay benefits, that their main complaint was that they weren't getting paid for any overtime that they worked, and that they would like to have at least 15 minutes in the evening to eat their lunch * * * he [Dr. Kaye] said that he would talk to the men and discuss these things with them, and if they were in agreement he would take care of these matters * * * he said that he thought it would be best that we drop this thought about the Union and he thought it would be better for the men to bargain on an individual basis, then he went on to say that he liked me very much and that the Company was continuing to open new stores and that he would like me to be-

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(Continued from preceding page)

(Newhard) "to stay overtime, that he wanted to talk with Mr. Nupp," that "Mr. Kaye and Mr. Nupp went in the back room and had a discussion" while Rivelis "was out in the store just walking around, looking the store over and such * * *. He was just walking through the store * * *. He did not go into the back of the store * * I am sure." According to Newhard, after Kaye and Nupp remained alone in the back room for about 45 minutes, Nupp came out and told him "that he thought he was going to get fired." Kaye was not produced to testify, nor was Respondent's failure to call him as a witness in any way explained. In these circumstances it will not be assumed that had he been produced his testimony would have contradicted that of Nupp and Newhard. Upon the entire record, including comparative demeanor observations, I fully credit Nupp and Newhard that the described conversation between Kaye and Nupp took place between the two of them privately in the back room as described by Nupp.

> come a manager of one of these stores * * *. I told him that I had known several pharmacists that had been in the role of manager pharmacists. I said that it hadn't worked out well for them and I didn't think it would work out for me * * *. He [Kaye] said that he was definitely concerned about the welfare of the men and in so far as my continuing to organize them in a union that he would prefer that I discontinue this * * *. Just before he left he told me that I didn't have to worry about losing my job for what I had done * * *. [This last was said in] a cynical tone that carried the meaning of just the opposite of what he said, that I did have to worry about losing my job for what I had been doing." [19]

Since Kaye did not testify, the foregoing is wholly uncontroverted by him, and, as I was favorably impressed with Nupp's testimonial demeanor, it is credited.

Consistent with Kaye's expression, as thus recounted by Nupp, of intention by Kaye to "talk to the men and discuss these things with them," Pharmacist Eisenhauer of Store No. 15 (Swayne Field), employed by Respondents for 8 years, testified that just before Chrismas Kaye visited

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[19] This is reminiscent of the words of Mr. Justice Learned Hand in *N.L.R.B. v. Federbush Co., Inc.*, 121 F.2d 954, 957 (C.A. 2), that "Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power." "Any determination of the exact nature and effect of such statements can be made only with due regard for the context of the statements, the characters and economic positions of those who heard it, and the relationships existing between a company and its employees." (Biggs, C.J., in *N.L.R.B. v. Morris Fishman and Sons, Inc.*, 278 F.2d 792, 796 [C.A. 3].) "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." (Harlan, J., in *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409.) "* * * it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action." (Reed, J., in *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 51.)

his store and asked him, "What's this I hear about some of you pharmacists wanting to join a union?" As Eisenhauer put it, "I played a little dumb, that I didn't know anything about it, then he said that he had just talked to Bill Nupp and he knew all about it, and he said that any time any of the pharmacists had any grievances they should call him and call him collect even if they wanted to in Cleveland." Respondents' Vice-President Rivelis conceded that following Kaye's conversation with Nupp they "check[ed] with the other pharmacists in the other stores * * * as to whether the men had any grievances at all." According to Rivelis, "We [i.e., Kaye and Rivelis] told him that we had heard from some of the—from one of the other pharmacists that some of the pharmacists were dissatisfied that they did not receive their overtime or time off in lieu of their overtime, and we were checking to find out if anything was owed the particular pharmacists as far as time off or money, whichever they prefer, and that we were going to continue checking with all the other pharmacists." However, according to Rivelis, Eisenhauer "did not mention any complaints to either Dr. Kaye or myself." On comparative demeanor observations and the record as a whole, I credit Eisenhauer's version, particularly since Kaye was not produced to testify nor his failure to do so explained.

Returning to Store No. 18 a few days later, Kaye again drew Nupp into the back room, where:

> "* * * he [Kaye] told me [Nupp] that he had talked to the men and that they would definitely get paid for any overtime that they had coming to them. He said that he still thought it would be best if the men would bargain on an individual basis. He then went on to say that I was definitely managerial material and that he would like me to go into one of his new stores as a manager, and he told me that if I wasn't

satisfied working where I was at that he could place me in any of the Company's other stores as a pharmacist. He told me if I wasn't satisfied with my salary that I should raise that point with him and something could be arranged on that, and then he suggested that I might make a loan with the Company and it would be interest free and strictly confidential between the two of us * * * I told him that I would think over what he had said * * *."

January-February, 1965.

According to Nupp:

"It was possibly two, maybe three weeks later, in the first part of January [1965, in the store] * * * Dr. Kaye asked me why I hadn't contacted him on the loan. I told him that I had discussed the matter with my wife and that if I could have the loan I would like to have it. He told me that I should write a letter to Cleveland to him and he would take the matter up with Mr. Amster, the Company president, about this. I told him that the amount of the loan would be about $15,000. He said that I should include this amount in the letter. I asked him about the terms of the loan. Dr. Kaye said that the terms of the loan would be up to me, that I should work something up and also enter this in the letter that I send to Cleveland. He then told me if I wasn't satisfied with my salary that I should raise this point with him * * *. Dr. Kaye stated that he would look into these other matters of the insurance plan and pension plan and discuss them with the men. I told Dr. Kaye that it made me quite happy, and that I was quite satisfied that he was doing this. Whenever he left he told me that if any problems should arise with the men that I shouldn't discuss this—discuss this with the group, but that I should talk to Mr. Pethke or call Dr. Kaye in Cleveland."

The foregoing, being uncontroverted by Kaye, is credited.

In consequence of the aforementioned December (1964) conversations between Nupp and Kaye, in early February Nupp wrote a letter [20] to Kaye requesting a $14,000 loan from Respondent. Subsequently, around the end of February or early March, Kaye informed Nupp on the telephone at home that the Company would lend him only $4,500, to which Nupp agreed, whereupon Kaye asked "if all the men were happy and I [Nupp] told him [Kaye] that all of the men hadn't received their overtime pay that they had due them. Dr. Kaye said that he hadn't had time to talk to all of the men, that they definitely would receive the pay that he had indicated they would get." However, when Nupp checked with the pharmacists he found they "were completely in the dark as to this. Dr. Kaye hadn't talked to any of them about these things."

Since, as already indicated, Kaye unexplainedly did not testify at all in this case, the foregoing is likewise wholly uncontroverted by him, and is credited.

Pharmacist Elmore testified that in February or March, Assistant Store Manager Rettig (Reddig), while in charge of Store No. 1 (Oregon)—admitted by Respondents' answers to be its agent acting on its behalf as its supervisor within the meaning of the Act—told him, during a discussion on the subject of organizing pharmacists "to have some strength to settle our grievances," that a "group was forming on the other side of the chain under

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[20] Gen. Couns. Exh. 16, undated, consisting of a photocopy produced by Respondent pursuant to subpoena. Although Respondent attempted to raise a question as to the date of this letter, at the hearing it disclaimed any notation of the date of its arrival or possession of the envelope in which it was contained. Neither Kaye nor Amster testified nor was there any other testimony as to the actual date of receipt of this letter. Under the circumstances, I credit Nupp's testimony that he sent this letter to Respondent early in February.

Bill Nupp and Ritner * * * a group for strength * * * strength in settling, getting our grievances settled." Rettig, who testified as Respondents' witness, did not deny this. I credit Elmore's testimony, which further establishes awareness by Respondent—although denied by it—of the union organizational activity and Nupp's central role therein.

Meanwhile, Nupp was continuing to meet in small groups with the pharmacists and to speak to individual pharmacists on these matters.

March-April, 1965.

There being no favorable developments with regard to any of the subjects of pharmacist complaints or grievances, and also having heard nothing further relative to the $4,500 loan he was expecting, in mid- or later-March or early April Nupp actively resumed his efforts among Lane pharmacists "about forming some type of organization to deal with the Company." Around this time (end of March or early April), Nupp actually formed an organizational committee of these pharmacists—consisting of himself, Baumgartner, Cousino, Eisenhauer,[21] Molnar, Nemetz, and Ritner, some of whom had been assisting Nupp right along in the effort to organize Lane pharmacists for collective bargaining purposes—and set up a meeting, which was held around the end of March or beginning of

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[21] Eisenhauer testified that subsequent to Kaye's visit to him (described above) in December, 1964 on the subject of pharmacists' grievances, Nupp's organizational "committee efforts" were "discontinued * * * for some unclear reason." Nupp credibly explained this by indicating that his talks with Kaye led him to believe, or lulled him into believing, that Kaye would remedy the pharmacists' grievances, but that when he realized by mid- or late March that this was not so, he resumed organizational activity, leading to the decision to seek formal representation by a union.

April at Lido Lanes Bowling Alley. This meeting resulted in a discussion of their grievances and a decision for union representation, with authorization to Nupp, who was elected chairman, to make the necessary contacts for that purpose.[22] Nupp thereupon commenced making contact with local unions.

According to Nupp, soon after this, around April 10, Lane General Manager Pethke visited him and told him that he could not have the loan he wanted. When Nupp reminded Pethke that Kaye had "promised to talk to the men concerning insurance and pension programs, and he handn't followed through on that either * * * Pethke * * * really blew up. He [Pethke] told me [Nupp] that he had talked to the pharmacists, and that the only one that was unhappy about the situation was me, and he said it wasn't any of my business how I felt about the other pharmacists. He said I had been a trouble maker ever since I had entered the employ of the Company, and that he would prefer that I leave the Company. He wanted me to go home and think it over * * *. About me resigning from the Company. I told him that I would think it over." However, Nupp did not contact Pethke, nor Pethke Nupp, thereafter.

Pethke's version of the foregoing is, in essence, that around the last week in March he visited Nupp and told him that the other three men in the store (Manager Clark, Assistant Manager Flowers, and Pharmacist Newhard) were unhappy over him and that Pharmacist Knestrict wanted to be transferred to that store (i.e., No. 18, Sylvania), and that since "There is plenty of jobs open for

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[22] Credited testimony of Nupp, Molnar, Nemetz, and Eisenhauer.

pharmacists. *You don't seem to be very happy here*[23] and certainly the store is not happy with you and we are in a position now to replace you," Pethke "suggested to him that he quit," or if he did not do so "within a month * * * I was going to recommend very strongly that he be let out." For reasons to be detailed below under the discussion of Nupp's discharge, I formed a poor impression of Pethke's credibility, not only based upon his observed testimonial demeanor but because of incredible testimony on his part as well as contradictions between his testimony and credited testimony of Store No. 18 Manager Clark, another of Respondent's witnesses. On the other hand, I was favorably impressed with Nupp's demeanor and overall credibility. I therefore prefer and accept Nupp's version of this episode.

After canvassing various local unions, which he (as well as his fellow-committeemen Nemetz and Ritner) rejected for one reason or another as unsuitable or inappropriate, on or about April 15 Nupp made contact with the Charging Union herein, arranging with its Representative Leedy to meet with the Lane pharmacists' organizational committee on April 21, at which time that Union was selected by the five or six pharmacists (including Nupp, Eisenhauer, Molnar, Nemetz, and Ritner) who met with Leedy, to assist in organizing and representing Respondents' pharmacists, with a mass meeting of pharmacists arranged for April 28 at Lido or Westland Bowling Alleys or Lanes. Thereupon, Nupp made arrangements for the April 28 general organizational meeting, personally

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[23] Emphasis added. Since there is no indication of unhappiness on Nupp's part other than in relation to his central role in protected concerted activities, the emphasized words could only have been a reference to those activities.

notifying 18-20 Lane pharmacists thereof in the week before April 28.[24]

About a week before the general organizational meeting of April 28, Pharmacist Molnar was approached at work at his Store No. 6 (Starr Avenue) by Dittman, not a pharmacist but Assistant Store Manager of that store, conceded by the pleadings to be an agent or supervisor of Respondents within the meaning of Section 2(11) of the Act and acting on their behalf. Dittman said to Molnar, "Do you know about Nupp's union activities?" Molnar "did not give him [Dittman] an out and out answer, mostly because I [Molnar] wanted to find out how much he knew about it. He proceeded to tell me that Bill Nupp approached—I don't recall which one—of the other pharmacists at one of the other stores and discussed the union, organizing a union for the pharmacists. I let him do the talking; I kept quiet. Later on, I drove him home * * * after we closed the store and I told him point blank I was in it just as much as Bill Nupp was in organizing the Union for the pharmacists. I told him I was in favor of it and I was going along with the rest of the pharmacists * * * that I was involved and that we needed an organization like this to take care of our benefits and adjust our inequities." Dittman also approached Pharmacist Baumgartner on the evening of April 28 and asked him if he was "going to be attending the big meeting that night" and Baumgartner said he was. Dittman did not testify. The foregoing wholly uncontroverted testimony of Molnar and Baumgartner is credited. Pharmacist Maza, employed by Respondent for over five years, three in Store

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[24] Credited testimony of Nupp, Hubbard, Dennis, Abell, Maza, and Newhard.

No. 19, credibly [25] testified in similar vein that on April 28, after he had been invited earlier that day by Nupp to attend the meeting that evening, his store Assistant Manager Portteus "asked me [Maza] if I were going to the meeting at Westland Lanes that night." When Maza responded that he wasn't sure and hadn't made up his mind, Portteus said, "If I were you, Harry [Maza], I wouldn't get mixed up with this Union activity that Bill Nupp is trying to start." Portteus did not testify. I also credit this uncontradicted testimony.[25]

Among the pharmacists contacted by Nupp during the week before the general union organizational meeting of April 28 to come to that meeting, was his fellow-pharmacist Newhard of his own Store No. 18 (Sylvania). Called by General Counsel as a rebuttal witness, Newhard credibly testified that he received a telephone invitation at home from Nupp on the evening of April 27 to attend the pharmacists' meeting at Westland Lanes after work on the following evening, April 28; and that the next morning—i.e., April 28, the day of the meeting, he (Newhard) reported this to Store No. 18 Manager Clark.[26] Also among those invited to attend the April 28 organizational meeting was Rettig, a pharmacist and Assistant Manager of Store No. 1 (Oregon), who according to his own testimony was invited on the day before, April 27, to attend, by Pharmacist Molnar.

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[25] Before deciding to credit Maza in this and other aspects of his testimony, I have given careful consideration to the evidence introduced by Respondent bearing on the issue of his credibility, as well as some surface or insubstantial inconsistencies on such matters as precise dates (a not uncommon failing of witnesses—others as well as he in this case—and perhaps the population at large), and credit him nevertheless.

[26] Newhard (still in Respondent's employ) did not attend the meeting and did not sign a Union card.

On the day of the general organizational meeting of Respondents' pharmacists—i.e., April 28—Nupp worked as usual at his store from 1 to 9:30 P.M. At around 9 P.M., Respondent's Area Supervisor Willis entered and remained in the front of the store until about 9:25, 5 minutes before closing time, when he went to the prescription department and asked Nupp to accompany him to the back room. There Willis told Nupp that since Pharmacist Krestrict, former manager of Store No. 3, lived in the neighborhood of Store No. 18 (where Nupp was employed) and wanted to transfer there, and there was an "overabundance of pharmacists," Nupp's "services were no longer needed," that "Knestrict would open up the store the next morning * * *. As of this moment, you are dismissed." Store No. 3 having been closed since February or so, and Knestrict out of there since then, Nupp asked Willis why Knestrict "had waited so long to be placed at our store, at No. 18." Willis said he "didn't know anything about that." Nupp asked Willis "if the Company had an overabundance of pharmacists why they had continued to advertise for pharmacists over the past several months." Willis said he "didn't know anything about that either." When Nupp asked Willis "if there had been anything wrong with my work," Willis did not reply, saying only that "they had an overabundance of pharmacists." Nupp thereupon left. He has not since been recalled or contacted by Respondent to return.

Nupp's discharge on April 28—a Wednesday, not the end of any pay period (Saturday)—occurred about a half hour before the scheduled Union organizational meeting of pharmacists at Westland Bowling Alleys that night. Proceeding from the store where he had just been discharged, to the scheduled Union organizational meeting at Westland, Nupp encountered about 20 pharmacists

there, to whom he introduced Union Representative Leedy, who discussed collective bargaining procedure. Nupp's discharge was also apparently extensively discussed. Following these discussions (during which Store No. 1 Assistant Manager Rettig, who was among those present, having according to his own testimony been informed of the meeting the day before, on April 27, by Pharmacist Molnar,[27] unsuccessfully urged the pharmacists not to join but to discuss their problems directly with Kaye), almost all present—i.e., 16 out of 19 or 20, signed Union cards.[28] On May 3, Nupp secured a 17th card signature, and by May 7 (another Union organizational meeting at Lido Lanes) two more, or a total of 19 by the latter date. Notwithstanding continuing requests commencing with a telegram on April 29, Respondents have at all times refused to recognize or bargain with the Union, resulting in the charge of violation of Section 8(a)(5) and (1) of the Act discussed *infra*.

According to the testimony of Respondent's witness Rettig (then Assistant Manager of Store No. 1, Oregon), on April 29, the day following his attendance at the large

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[27] Respondents' witness Rettig credibly testified that he reported the meeting of April 28 on the following day (i.e., April 29) to his District Supervisor Wagenman. It is interesting to note that Rettig is silent (almost pointedly so, it would seem) in his testimony as to whether he likewise informed Wagenman (or other management representative) of the April 28 meeting *on or prior to* April 28, since Rettig by his own admission knew on April 27 from Pharmacist Molnar that the meeting was to be held on April 28. It seems hardly likely that Assistant Manager Rettig, who took so hostile an anti-Union view at the April 28 meeting (the only one there to do so) and who so loyally and promptly reported on it to District Supervisor Wagenman the next day (April 29), would have been less loyal (if not disloyal in his supervisory capacity) and kept completely silent about reporting it before the meeting.

[28] Credited testimony of Nupp, Leedy, Abell, Baumgartner, Dennis, Eisenhauer, Hubbard, Maza, Molnar, and Nemetz.

organizational meeting on the night before, he reported the meeting to his superior, District Supervisor Wagenman, who in turn, in Rettig's presence, reported it to Cleveland headquarters. Vice-President Rivelis testified that the Company's reaction to this notification—including, apparently, according to him, learning from Wagenman the identity of the individuals who had attended the meeting—was to direct General Manager Pethke "to have our supervisors check to see what the feelings of the pharmacists were." On the same day (April 29), while Pharmacist Nemetz was on duty at Store No. 6 (Starr Avenue), he was approached in the prescription department by District Supervisor Wageman, who "wanted to know what the beef was that the boys had * * *. Well, I told him that it was the usual overtime pay, hospitalization, sick pay, and so on and on. He wanted to know whether or not I attended the meeting and I said, 'Yes, I did,' and he wanted to know who was there; whether they were the younger or the older men, and I told him they were pretty well divided. He wanted to know if anyone signed cards and I told him yes. He asked me if I signed a card and I told him I did. Then, as he was leaving, he turned to me and said, 'Well, you and Cy [Baumgartner], the other pharmacist, keep me posted as to how things are coming along.' * * *. He wanted to know how many were at the meeting and I told him about 20 * * *. After he asked me if I had attended the meeting and I told him I had, he said, 'You know we fired Bill Nupp last night.' I said, 'Yes, I heard he was fired.' Then he said, 'Well, Nupp has been nothing but a troublemaker and I should have fired him a long time ago.'" Wagenman was not called to testify. The foregoing testimony of Nemetz, an impressive witness, is credited.

The other District Supervisor, Willis, conceded in his testimony as Respondents' witness that he learned of the April 28 organizational meeting on the next day (April 29) from Wagenman or Pethke, and that he visited his nine stores on April 30 and May 1 not only for the usual supervisory purposes but "in addition to find out what happened, what the trouble was," talking to managers, pharmacists, and other store personnel for that purpose. Willis was, it seemed to me, unnecessarily evasive and vague about these conversations, incredibly testifying that he "more or less listened to what they had to say about it" and that he "didn't really do any questioning as to what took place." He nevertheless recounted his approach to Pharmacist Yarnell—which he agreed was typical of that to the the other pharmacists—as involving his (Willis') stating to Yarnell, "I understand some of the fellows have signed up for a union," with Yarnell replying in the affirmative but (untruthfully or inaccurately) indicating that not many of the pharmacists were involved. Another typical conversation between District Supervisor Willis and a pharmacist on April 30 or May 1 was, according to him, with Pharmacist Newhard (of Pharmacist Nupp's No. 18, Sylvania, store), as to which Willis testified, "I told him [Newhard] that I understood that some of the pharmacists had signed up for the Union and what did he know about it." Newhard replied that he also so understood but that "he [Newhard] wasn't interested" and didn't think "very many of * * * the ones he talked to" were. Willis further recalled speaking to and eliciting responses in the same vein from Pharmacist Langdon at Store No. 5; and that he also talked to all of his managers "to learn or determine what the trouble was * * * and what might be the cause or anything pertaining to it * * *. These were my—what I was

seeking." All this, Willis reported to General Manager Pethke. Pharmacist Maza's testimony indicates that he, too, was among those interrogated by Willis at this time. Maza credibly testified that about two days after the April 28 meeting, that is on or about April 30, Willis "came into the prescription room and he asked me if I attended the meeting last night. I said, 'What meeting last night?' He said, 'I meant the other night.' Then, he proceeded to name four or five names of pharmacists and asked me if any of those were present at the meeting. My answer was, 'I don't remember.' He asked me what the trouble was and I told him it was a matter of pension that we had been asking for for the last few years, job security and working conditions. We figured we had been neglected and we needed some type of organization to represent us to get us these changes." Willis responded that "about the pensions and that, maybe there was something to it."

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On or about May 1, according to Pharmacist Maza, Assistant Store Manager Portteus of his Store No. 19—whose supervisory and agency status under the Act is conceded in the pleadings—told him that "the company had the names of those who had attended the meeting and wouldn't forget about it." Maza further testified that on May 2, a Sunday, Vice-President Kaye came into his store and called him into the back room for a lengthy discussion wherein "The first statement was that he was shocked that a man of my intelligence would associate with a person like Bill Nupp in trying to form a Union * * *. He next stated that he couldn't understand how professional people would want others to be their spokesman." Kaye then chided Maza as one of several coreligionists for "get[ting] mixed up in this thing," and told him

to talk to Amster, President of the Lane chain. Maza replied that "we certainly weren't treated like professional men in this organization" and that the coreligionists had not been advanced. Kaye:—

> "admitted knowing that there were 19 signatures for the Union, and the Company only had 10 against, but with a little prodding and with my help, he was quite sure that this could be changed * * *. He further said that Mr. Nupp had been a source of trouble to the Company for a long time and that they had a lot of complaints about his work. My answer to that was, 'Why did you wait so long; he has been with you at least four years.' He had no answer to that * * *. He said that he knew that Bill Nupp had started this organizing and he should have fired him six months ago when he first found out about it * * *. He said, 'Harry, you give us all the help you can and see if you can get others to change their minds.' I told him that I was 100 per cent with the boys and it was too late to help * * * his main plea during the whole conversation was to try to arrange a meeting with the signers of the cards and Mr. Amster and himself so that the Company could give their side of the story and he was quite sure that they could iron out and straighten out all of the differences. My answer was to that that the only way I could arrange a meeting was if Mr. Kohler, the attorney, and Mr. Leedy, the Union organizer, was also present. He said that they weren't interested in that."

According to Maza, about a week later, following hard on a further Union meeting held on May 7 at Lido Lanes, Assistant Manager Portteus told Maza that "the Company knew that the count of the vote stood at 19 to 10, with 19 of the pharmacists for the Union and 10 against" and that "the Company was planning on changing the store hours, thereby necessitating fewer pharmacists." Since

neither Portteus nor Kaye testified, the foregoing testimony of Maza is wholly uncontroverted, and it is credited.

Along the same lines, Pharmacist Nemetz of Store No. 6 (Starr Avenue) was also visited around this time by Vice-President Kaye, "and [according to Nemetz] the first thing he said to me was, 'Mike, of all people, why you? The others I can understand, but why you?' He asked me what the complaints were and I told him, 'Dr. Kaye, you have talked to all the others, why do you want further conversation from me? It would be wasted time.' He pointed out at that time about my obligation to the Company and about my loyalty." Pharmacist Eisenhauer was similarly visited around this time at Store No. 15 (Swayne Field) by Kaye, who "wanted to know what this was all about." While Eisenhauer complained about "long Sunday hours, overtime pay, holiday pay and other complaints," Kaye was making notes, and Kaye "asked me [Eisenhauer] why we had to do it this way, why couldn't we come to him instead of doing it this other way." When Eisenhauer asked why Nupp had been fired or laid off, Kaye replied that it was because one of the stores "had been closed and the pharmacist that worked there wanted to go out and work by his home, which was in Sylvania * * * where Mr. Nupp was employed. He said they had an oversupply of pharmacists, so they didn't have any place for Bill [Nupp] at the time * * *. I said, 'What kind of seniority does Lane's have?' I knew for instance there was three or four pharmacists that had been hired later on, or had less years with the Company than Mr. Nupp had * * *. He said that they just didn't have any place for him at the time * * *. It was subject more or less to change * * *. Towards the end of the conversation * * * he asked if I signed and I said, 'Yes, I did.'" Kaye also invited Eisenhauer "to Cleveland to

see Mr. Amster with my grievances if I wanted to." Pharmacist Molnar also received a visit around this time in Store No. 12 from Kaye, who, taking notes, "wanted to know what had happened * * *. He said that this thing had snowballed and * * * that, 'We don't need a third party to take care of this. We can settle this among ourselves * * *.' I asked him why Bill Nupp had been fired. Dr. Kaye said that Don Knestrict had been floating around the organization and he didn't have a store to go to, so they had to make room for him, and they got rid of Bill Nupp * * *. He [Kaye] said nothing at all about that [Nupp's being unsatisfactory in any fashion]." Pharmacist Baumgartner's testimony indicates he received a similar visit at Store No. 6 (Starr Avenue) from Kaye, who told him "that the troubles could have been worked out without involving a third party." Likewise, Pharmacist Hubbard was visited at Store No. 10 (Dorr Avenue) by Kaye, whom she told in the prescription room in response to his questions that "we didn't get lunchtime; we didn't have enough help in the store; I told him we weren't paid for holidays like we were supposed to be, and a lot of other things." Kaye, who took notes, "wanted to know why we had to have a third party handle our grievances. He said we had always been able to sit down and talk and straighten things out, and why did we need a third party." When Hubbard inquired about job security and why Nupp had been fired, Kaye indicated only that it was a matter of desire by a senior pharmacist to work closer to home.

The foregoing testimony of Pharmacists Nemetz, Eisenhauer, Molnar, Baumgartner, and Hubbard being uncontradicted by Kaye, who, as already indicated a number of times in other contexts, was not called to testify, the testimony of these pharmacists, each of whom

impressed me as being essentially highly credible witnesses, is credited.

Meanwhile, during this period, the first week or so of May, Nupp continued successfully to solicit additional Lane pharmacists (Elmore, Harris, and Parisky) to affiliate with the 16 who had already joined for membership; and another organizational meeting attended by about 20 Lane pharmacists was held at Lido Lanes on May 7. With Kaye contacting pharmacists as described above, on May 12 Respondents' counsel wrote the Union that they "have reason to doubt your majority status, as claimed," and were filing an election petition. Thereupon, a Union meeting, also attended by about 20 Lane pharmacists, was held on May 13, this time at the Union hall, with Union counsel present. As described by Union Representative Leedy, "the purpose of the meeting was to decide what to do in view of the Company's refusal to discuss our demands; the Company's refusal to take Nupp back and things like that." Further according to Leedy (corroborated by other witnesses), "This discharge of Bill Nupp became a very important thing to us, and we discussed the Company's efforts to influence the individuals and they were trying to break up the group. As a sign of their unity, they decided to vote on a strike action." The strike vote was unanimous. Accordingly, the Lane pharmacists went out on strike on Friday morning, May 14, remaining out and picketing for two weeks until May 28. During this period about 10 of the Lane drugstores were picketed by 16 of its pharmacists.[29]

Developments during the strike appear also to have followed a consistent pattern. According to Pharmacist

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[29] I.e., Abell, Baumgartner, Cousino, Dennis, Eisenhauer, Elmore, Hebel, Hubbard, Levine, Maza, Molnar, Nemetz, Nupp, Parisky, Pietras, and Ritner.

Nemetz, on the very morning before the strike actually began, i.e., around 8 A.M. on May 14, he received a telephone call from Cleveland from Lane President Amster, who "appealed to my sense of loyalty to the Company" and "to use my influence to keep the others from going out." Nemetz nevertheless went out and picketed. On the next day (Saturday), District Supervisor Wagenman telephoned Nemetz at home to the same effect, asking him to "come back to work and all will be forgiven." Also on the first day of the picketing (May 14), Pharmacist Dennis, while picketing, was approached by Kaye and Willis, who said "we shouldn't be outside picketing, that we should be inside working, that we should do some soul-searching and that our loyalty belonged to the Company." Pharmacist Maza received night calls at home regularly from Kaye urging him to return to work and procure others to do so, and to arrange meetings with any group he could get, even only his coreligionists. Kaye also pointed out to Maza that "Those signed [Union] cards don't mean anything and we have plenty of time, with your help, Harry [Maza], to change those signatures." Kaye even put President Amster (his father-in-law) on the phone to plead with Maza. On the second day of the picketing (May 15), Kaye and General Manager Pethke followed Maza to his car, where Kaye told him three pickets had returned to work and a new pharmacist had been hired. To all this Maza apparently turned a deaf ear. He was then told "that the Company would never allow Union to be formed here no matter what it cost." It is once again perhaps appropriate to point out that Kaye failed to testify in this case. Testifying as Respondent's witness, Pethke was silent on this subject. I credit Maza's testimony.

Pharmacist Elmore testified that he, too, was called at home by Kaye, on the Sunday night (May 16) after the picketing (in which he had joined) had started, "to see why I wanted to become a member of the Union * * *. He wanted to know what my grievances were. I went on to tell him what my complaints were. He wanted to know why we professional men needed a union. I told him that we were getting no place individually, that I had gone to him with complaints as much as six months ago and none of them were taken care of." Kaye also "said that he would like to sit down with the pharmacists and talk this thing over, and I told him that as far as myself, I had already made my commitments to the Union. I hadn't made any progress * * * as an individual up until now, and I felt that I should stick with a union in order to get any satisfaction there." Pharmacist Parisky, employed by Respondent for over five years and a participant in the picketing, also received a phone call from Kaye a few days or so after the strike started. Kaye asked him "why we got involved with the Union * * *. He told me that we were too intelligent to become confused and brainwashed with all of this Union activities. He asked why I didn't come to them and iron out the differences to the satisfaction of both of us * * *. I told him that the matter was out of my hands and I couldn't do anything about it." Kaye again telephoned Parisky, at home, saying, "Why don't we go back to work and we can straighten this whole thing out between the individuals and ourselves?" The foregoing testimony, likewise wholly uncontroverted by Kaye, is also credited.

The composite testimony of Pharmacists Abell, Hubbard, and Eisenhauer indicates that during the first week of the strike District Supervisor Willis approached them on the picket line and after he remarked that one of the

pickets had returned to work, Hubbard asked him why one or more of the stores had closed at 7 P.M. (rather than the usual 9 P.M.) on the previous Sunday. Willis replied (in the words of Abell) that "the Company was considering cutting the hours during which the store would be open on Sunday" and that "that would enable the Company to dispense with the servcies of * * * one-half of the pharmacists." In this context, Abell "mentioned that we should not have to work from 9:00 to 9:00 every other Sunday, which has been our schedule." Testifying on this subject, Willis conceded he had such a discussion with these three picketing pharmacists and that the hours had been shortened to 7 P.M. at one of the stores, but that he indicated this was only during the period of the strike and that the same course might be followed in the other stores for that reason. Although I credit the testimony of the three pharmacists[30] as to what was said by Willis, who perhaps did not make himself as clear as he should have, nevertheless the aura of the discussion, occurring within a frame of reference of

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[30] Including Abell, as to whose credibility I have carefully considered the material introduced and offered by Respondents. Upon the record presented, the objections of General Counsel and the Charging Party (Transcript, pp. 1133-1137) to receipt in evidence of Respondents' Exhibit K-4 for Identification are overruled (*cf.* Respondents' Exhibits K-1, K-2, K-3, and K-5-A through K-5-E) and it is received in evidence as Respondents' Exhibit K-4. General Counsel's motion (Transcript, p. 248) to strike from the record evidence of certain alleged misdemeanors is hereby denied. The test as to whether conviction of crime may be considered as impeaching evidence appears not to hinge upon whether it is a felony or misdemeanor, but rather upon whether the criminal act amounted to or involved moral turpitude or *crimen falsi*. See II WIGMORE, EVIDENCE Sec. 520 (3d ed. 1940); III *id.* Secs. 980, 982, 987; RICHARDSON, EVIDENCE Secs. 412, 505, 518 (8th ed. 1955); Act, Sec. 10(b) and FED. R. CIV. P. 43(a); *Crown Corrugated Container, Inc.*, 123 NLRB 318, 319 and cases there collected. That the acts here involved qualify for consideration under this test cannot be ruled out.

Company attempts to keep the stores open notwithstanding pharmacist shortages resulting from the mass strike and picketing, appears to have imparted sufficient ambivalence and uncertainty to Willis' words as not to warrant a finding that they constituted a threat to curtail pharmacist employment through permanent reduction of store hours (or, conversely, a promise of benefit of shorter hours to them—not here charged—by doing so).[31] I so find.

Further consistent with the pattern established by the testimony of various Lane pharmacist witnesses, Pharmacist Dennis, employed by Lane for 7 years, testified that while he was picketing Store No. 14 (Westgate) a week after the strike started, he was approached by Vice-President Rivelis (with General Manager Pethke), who "wanted to know what the beefs were, and I told him I didn't have any in particular but we all had some, and we enumerated some. He [Rivelis] said, 'Is there any reason we can't get together without the Union and iron these things out?' He said, 'Cleveland doesn't know about those things, and I am sure that Mr. Amster would be glad to come down and talk to the boys.' I said I was sorry but it was out of my jurisdiction and we were now represented by the Union." Also, Pharmacist Hebel testified that around the same time, while he was picketing Store No. 16 with Pharmacist Cousino, they were similarly approached by Rivelis and Pethke, Rivelis inquiring "why we hadn't informed him about our grievances * * *. I inquired where Dr. Kaye was, and he [Rivelis] responded that he

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[31] Furthermore, the conclusion contended for by General Counsel appears to depend at least in part upon the employee witnesses' interpretation of what Willis meant, as to which I rejected proffered proof. See *The Rein Company*, 114 NLRB 694, 698; *B.M.C. Manufacturing Corporation*, 113 NLRB 823, 825 n. 8.

could get Dr. Kaye here on short notice * * *. One more thing that Mr. Rivelis stated is that he would never deal with the Union." On direct examination Rivelis testified merely that he was in Toledo on May 18 and did not see Dennis or Hebel on *that* day. In response to questions by the trial examiner, however, Rivelis conceded that he did indeed speak to both Dennis and Hebel between May 21 and 28. He did not dispute their above-described testimony, nor did Pethke testify upon this subject. I credit this testimony of Pharmacists Dennis and Hebel. Pharmacist Elmore testified comparably that, while picketing Store No. 12 a few days before the picketing ended, he was called into the store by Assistant Manager Garland to talk on the telephone to Rivelis, who inquired about and discussed his grievances at "great lengths * * * no pension plan, no sick time * * * work from 12:00 or 1:00 o'clock to 9:30 without a break, long Sundays, some of the stores you get one day off every two weeks." Rivelis invited him to sit down with him or Kaye or even Amster on these matters. When Elmore indicated he wanted the Union to do this for him, Rivelis "told me to think it over. If I changed my mind I could reach them at the motel where they [Rivelis and Kaye] were." This testimony, likewise uncontroverted, is also credited.

On May 27, a further request upon Respondent to bargain, made to Kaye by Union counsel, was rebuffed by Kaye, who insisted upon "an election." The pharmacists stopped picketing on May 28. A few days later, back at work, Pharmacist Maza was told by General Manager Pethke, "I made a mistake. I should have fired Bill Nupp six months ago when he started this trouble."

On May 28, the day the 2-week picketing by Lane pharmacists ended, Lane President Amster addressed a letter "To Our Pharmacists," wherein he stated, among

other things (Gen. Couns. Exh. 13; all emphases are those of Amster):—

> "I was greatly surprised to learn that any of our Pharmacists would want to join the Retail Clerks Union. I never considered Pharmacists as 'retail clerks.' I considered them as Professional men who would not want to join a Union composed of super-market and department store clerks. I also cannot understand how any outsider, such as a Union organizer who knows nothing about Pharmacy could discuss your problems or ours[32] * * *. A Union organizer * * * promises pie in the sky to get the people to join. He knows that if he does get them to join, he will have to negotiate with the owners and there is no law that requires the owners to accede to any of his requests or so called demands * * *. My record of treatment to people working with me during the past 45 years proves I have always been fair. I do not intend to change at this late date in my life. If people working with me have problems, they are my problems too—and as long as I am able to talk to them *directly*, instead of through a go-between, I will want to help them.[33] * * *. In closing I want you to know I have no malice in my heart against anyone. I feel sure that almost all of those who walked out were coerced or misled by a lot of promises. I welcome

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[32] The statutorily guaranteed right of employees to designate a collective bargaining representative does not contemplate that the employer shall pass upon its qualifications. "The right of employees to be represented by officials of their own choice doubtless must outweigh any principle of *persona non grata*." *N.L.R.B. v. Signal Mfg. Co.*, F.2d , 60 LRRM 2308 (C.A. 1), cert. denied, U.S. , 61 LRRM 2147 (1966).

[33] The three sentences (comprising a separate paragraph) which follow this one are consistent with this indication by Amster against "help" to employees if represented by the Union:—"If there is any reasonable request made of me *by any of our people*, it will be granted. If the request is unreasonable, whether by an individual or by a Union organizer, it will not be granted. I know you would do the same if you were in my place." (Emphasis added.)

them all back to work with us together as a team. I will gladly come to Toledo to talk to you individually or collectively provided I am *invited* to do so. I will *not* talk to any Union organizer or outsiders. If you decide you want the Retail Clerks Union organizer to speak for you, I will not talk to him. He will have to talk to our attorneys. I prefer to be able to talk to you *directly* about any problems you may have and answer any questions you may ask. I will be fair and honest and I hope you want it that way."

A still further request to Respondents' counsel by the Union's counsel, on July 27, indicating the continuing nature of the Union's bargaining demand, also met with no success.

Upon the entire record, I find that Respondents coercively interrogated pharmacist employees in connection with their and other pharmacist employees' union organizational affiliations and activities; promised or held out to them prospects of economic benefits if they bargained with Respondents individually instead of collectively through a union bargaining representative; enlisted them to engage in surveillance and report back to Respondents on other employees' union organizational activities, and to dissuade other employees from affiliation with or support of the Union; solicited them to deal individually directly with Respondents instead of bargaining collectively through a union bargaining representative; and threatened them with or indicated to them the prospect of economic detriment in the event of continued union affiliation or collective bargaining endeavors. I further find that Respondents did not, however, threaten pharmacist employees with discharge or reduced hours in reprisal for Union affiliation or activities.

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E. Refusal to Recognize or Bargain Collectively With Union.

Respondents concede they have at no time recognized or bargained with the Union. They justify this failure upon several grounds, which will be discussed separately.

1. Appropriate Unit.

To begin with, Respondents urge that the Board has held no hearing (prior to the instant case) to determine what bargaining unit is appropriate here; and that therefore, apparently, there being no Board determination as to what constitutes an appropriate unit, Respondents were privileged to reject any. This contention is unsound. I am unable to discern any requirement that the Board hold a Representation case hearing as a precondition to entertaining an unfair labor practice charge of refusal to bargain collectively in violation of Section 8(a)(5) of the Act. Under Section 9(b) of the Act, determination of unit questions by the Board is not restricted to Representation cases. Accordingly, as pointed out in its *Seventeenth Annual Report* (1952), p. 56, the Board has determined unit questions in cases "in which an employer is charged with violating section 8(a)(5) by refusing to bargain with the representative of employees in an appropriate unit, cases in which a union that represents employees in an appropriate unit is charged with violating section 8(b)(3) by refusing to bargain with their employer, and cases in which the Board must determine whether a union-security agreement is valid, in that it covers employees in an appropriate unit as required by section 8(a)(3)."

Insofar as the appropriateness of the unit claimed for bargaining purposes is concerned, that unit—consisting of the professional pharmacists in the Lane drugstores in

and around Toledo (i.e., Toledo itself, Bowling Green, Sylvania, and Oregon)—comprised the professional pharmacists of the Lane drugstore chain at the time of the Union's bargaining request (April 29).[40] In view of factors already discussed and found, involving the centralized managerial, administrative, and operational integrity of the then 17 Lane drugstores—including systematic pharmacist interchange, unified payroll system, centralized procurement, warehousing, and merchandise distribution, and geographical hegemony of supervisory personnel—it is apparent that the professional pharmacist employees in this chain had common, indeed the same, interests and needs with regard to the usual subjects of collective bargaining. In view of the existing situation, to treat the individual stores as separate bargaining units would enshrine fictional form and flout reality. It is entirely clear under the circumstances presented that the bargaining unit requested—namely, all professional pharmacists in the Lane chain as comprised at the time of the foregoing request (viz., 14 stores in Toledo proper, plus 1 each in contiguous, suburban, or nearby Bowling Green, Sylvania, and Oregon, on April 29) was "an appropriate unit" within the contemplation and intent of the Act. *The Great Atlantic & Pacific Tea Company, Inc.*, 128 NLRB 342; *Daw Drug Co., Inc.*, 127 NLRB 1316; *Crown Drug Company*, 108 NLRB 1126. Respondents were not at liberty to refuse recognition of such "an appropriate unit" upon the basis of their own *ipse dixit* distaste or preference perhaps engendered by their own estimations that they might fare better in their professed aim to defeat collective bargain-

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[40] Fostoria (Store No. 21), injected herein by Respondents, located 40 miles from Toledo (Gen. Couns. Exh. 17) was opened later (May 18). Since it was not in existence at the time of the bargaining demand, its attempted inclusion herein is for that reason alone sheer obfuscation.

ing, based upon their private calculations as to the extent of the pharmacists' organization in the various separate stores of their chain.

Contrary to Respondents' current contentions, the Union's bargaining requests (Gen. Couns. Exhs. 5 and 6) were clear enough. No "special formula or form of words" is necessary to arouse the statutory obligation to bargain, so long as the request is reasonably implicit in the language used. *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914; *Dallas Concrete Company*, 102 NLRB 1292, 1312, enforced, 212 F.2d 98 (C.A. 5). Respondents could not have been misled as to the stores intended; and, since requests to bargain are necessarily to be construed within the subject to statutory requirements and limitations, Respondents should also have known that here they did not (and could not) include supervisors and others exempted. *Heck's, Inc.*, 156 NLRB No. 73. (Indeed, the Union expressly so stated.) I find that here, as in *N.L.R.B. v. Clearfield Cheese Co.*, 213 F.2d 70, 74 (C.A. 3), "There is no rational foundation for assuming that [Respondent was] confused by the request for recognition." Furthermore, notwithstanding their current contentions to the contrary, Respondents themselves in their Representation petition filed with the Board on May 12 through their own counsel (Gen. Couns. Exh. 2A) specified this very unit ("All pharmacists employed by the Employer at its drug stores in Toledo, Ohio, and vicinity. Excluded All other employees and guards and supervisors as defined in the Act.") as appropriate, consisting of "Approx. 25" employees. It is eminently clear, as hereafter found, that Respondents' refusal to recognize, meet, or have anything to do with the Union was not the result of any doubt on Respondents' part as to what the unit being requested was,

or as to its appropriateness, but was on the contrary motivated by rejection of the collective-bargaining principle and their intention to gain time to do away with Union representation so that they could "deal" with their pharmacists individually as in the past. Cf. *N.L.R.B. v. Austin Powder Co.*, 350 F.2d 973, 977 (C.A. 6); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2). "The Respondent's objection as to the scope and composition of the unit, raised for the first time at the hearing, comes too late to convince us that its refusal was based on some bona fide doubt as to the appropriateness of the unit." *United Butchers Abbatoir, Inc.*, 123 NLRB 946, 957.

Upon the entire record, I find that at all material times the requested unit, consisting of all Lane pharmacists in Respondents' Greater Toledo (including Toledo, Sylvania, Oregon, and Maumee) and Bowling Green, Ohio, drugstores, excluding all other employees, guards, and supervisors as defined in the Act, was a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act.

2. Union Majority.

A further claimed justification asserted by Respondents for their refusal to recognize or bargain with the Union is that the Union did not represent a majority of employees in the appropriate unit. As of the controlling date of the Union's bargaining request—i.e., April 29 (as well as April 30) [41]—I find that it did.

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[41] There is some indication (testimony of Respondents' witness Rivelis) that the Union's April 29 bargaining request telegram was not received (despite the notation thereon) until April 30. No material change occurred in the interim.

I further find that Chief Pharmacist Searle is not includible in the appropriate unit, also because he is a managerial or supervisory employee.[44] I find that Cycler-Zaugg is not includible because not "professional" within the definition of the Act.[45] I find that Waldman should not be included because at best a seasonal casual type of employee who is not fairly regardable under the circumstances of his particular case as having a sufficient community of bargaining interests with regular full-time or regular part-time professional pharmacists to justify equal bargaining power.[46] (Were this otherwise, supernumerary, transient casuals of this type could, even by design, wholly offset the legitimate bargaining aspirations of a regular fulltime workforce.) I further find that Cunningham is not appropriately includible in the unit because he is a Social Security retiree, not interested in earning over about $1200 yearly in any event, with insufficient community of interest with the regularly employed pharmacists[47] and additionally because he retired to Florida in 1962 (following summer employment only from 1957-1961) and has not worked for Respondents at all since 1961 until temporarily at the time of the pharmacists' May 14, 1965 strike. I also find that Segan and Doder are not properly includible in the bargaining unit because they have not worked for Respondents for years, are substantially disabled, without reasonable expectation that they or either of them will be able to resume employment as professional pharmacists with Respondents, because Respondents themselves in June appear not to have con-

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47 *The Horn & Hardart Company*, 147 NLRB 654; 659; *Taunton Supply Corp.*, 137 NLRB 221, 222-223.

sidered them as such employees, and because under the circumstances they have no community of bargaining interest with the unit pharmacists actually employed and it would be unfair to accord them equivalent bargaining status.[48] Respondents' current insistence upon including all of these individuals in the proposed unit appears to be contrived and artificial.

I find as shown in detail in *Tables 1 and 2*, that on April 29, April 30, May 4, and May 7, 1965 the Union was the duly designated bargaining representative of a majority of a unit of Respondents' pharmacist employees appropriate for bargaining purposes.

3. *Refusal to Recognize or Bargain With Union.*

As has been found, at the time of its first bargaining request on April 29 the Union had, and thereafter including the times of its subsequent bargaining requests continued to have, duly signed representation authorization cards from a majority of Respondents' pharmacists in a unit appropriate for collective bargaining purposes.

Under these circumstances, Respondents' conceded refusal at those and all other times to recognize, meet, or bargain with the Union was in violation of Section 8(a)(3) of the Act, unless justifiable. As to this aspect of the case, Respondents offer no justification other than that they allegedly "doubted" the Union majority, in part because of their "doubt" as to the unit or its appropriateness. I find no basis for doubt, and that Respondents did not in fact have any doubt—as witness their own designation of the same unit in their petition for an election (Gen. Couns.

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[48] *The Horn & Hardart Company*, 147 NLRB 654, 659-660; *Sullivan Surplus Sales, Inc.*, 152 NLRB No. 12, 59 LRRM 1041.

Exh. 2A)—as to the unit intended by the Union; and I have already found the unit to be appropriate.[49] There thus remains as the sole basis for Respondents' alleged "doubt" of the Union's representative status, Respondents' alleged supposition that the Union did not in fact represent a majority of the unit employees. Had this in fact been true, or if Respondents had a valid basis for entertaining good faith doubt as to whether the Union actually held the authorizations which it claimed to hold from Respondents' employees, Respondents would not have been under obligation to recognize or bargain with the Union.[50] But a good faith doubt is a doubt founded in fact or grounded in reason, as distinguished from the alleged doubter's mere self-serving *ipse dixit*. In this case, no basis for doubt on Respondents' part that the Union held the representation authorizations it professed to hold, has been shown. At no time did Respondents in any way seek to ascertain the facts in this regard, and the Union's express offer to establish its representation status through the good offices of the Toledo Labor Management Citizen Committee (Gen. Couns. Exh. 6) was spurned.[51] Furthermore,

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[49] Indeed, it has been held that even good faith doubt as to appropriateness of unit is not a justification for refusal to bargain if in fact the unit was appropriate. *N.L.R.B. v. Primrose Super Market of Salem, Inc.*, 353 F.2d 675 (C.A. 1); *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289, 291 (C.A. 4); *Oklahoma Sheraton Corp.*, 156 NLRB No. 69, n. 1, 61 LRRM 1115; *Quality Limestone Products, Inc.*, 153 NLRB No. 93, 59 LRRM 1589, 1592.

[50] *N.L.R.B. v. Wheeling Pipe Line*, 229 F.2d 391, 393 (C.A. 8).

[51] It can only be concluded that Respondent—intent on avoiding any dealings with the Union—"deliberately shut its eyes to the facts." *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2), cert. denied, 370 U.S. 919. See also: *N.L.R.B. v. Biles Coleman Lumber Co.*, 98 F.2d 16, 22 (C.A. 9); *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 868-869 (C.A. 2), cert. denied, 304 U.S. 576, rehearing denied, 304 U.S. 585. It might also

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if Respondents had any lingering suspicion about whether their pharmacists were behind the Union which claimed to represent them, such an alleged suspicion should have been thoroughly dispelled when Respondents saw 16 of their pharmacists out on strike for two weeks, picketing their stores.[52] Moreover, Respondents' consistent, continued, and deliberate conduct from the moment of the first Union bargaining request (as well, indeed, as prior thereto) is inconsistent with the conduct of a person who doubts a Union's representative status; rather, because of their anguished attempts to talk their employees out of exercising their Congressionally-guaranteed right to bargain collectively through the Union, it is indicative of a belief that the Union does indeed possess representative status, and of an intention to dissipate and overcome that status.[53]

Respondents insist they were entitled as a matter of right to an election to establish the Union's representative status before they were obliged to recognize or bargain with it. This is by no means true, particularly in a context of broad-spectrum unfair labor practices and widespread, continuing violations of the Act by the Employer, as herein. "* * * 'there is no absolute right vested in an

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(Continued from preceding page)

be said that Respondents' extensive unfair labor practices and unilateral bargaining invitations to their employees while professing "doubt" that the Union controlled a majority, may be inconsistent with any current contention of inappropriateness of unit. Cf. *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2).

[52] Cf. *N.L.R.B. v. Shurett*, 314 F.2d 43, 44 (C.A. 5); *N.L.R.B. v. Preston Feed Corp.*, 309 F.2d 346, 350-351 (C.A. 4); *Florence Printing Co.*, 145 NLRB 141, enforced, 333 F.2d 289 (C.A. 4); *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F.2d 917 (C.A. 6).

[53] *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914.

employer to demand an election.'" *N.L.R.B. v. Decker*, 296 F.2d 338, 341 (C.A. 8). Beyond doubt, an employer who engages in widespread violations of the Act designed to overcome a Union's representative status, as herein, while refusing to recognize or bargain with the Union because of a professed "doubt" of its representative status, violates Section 8(a)(5) of the Act.[54] Congress has not seen fit in the statute [55] to condition the obligation to bargain upon prior certification through an election. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 69, 72 n. 8, 75, rehearing denied, 351 U.S. 975.

> "It is too late, in light of the declared wisdom found in the National Labor Relations Act, for an employer to drift into an eddy, as Decker does, and now make the contention that he has no duty to bargain with a particular Union until it has been certified by the Board, after an election. Under the National Labor Relations Board, 'An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support.'" (Decker, *supra*, at 341.)

As already indicated, not only did Respondents here have no good faith doubt, but in spurning the Union's offer to submit its proof of its representative status to the conventional disinterested cross-check of cards suggested by the Union, "the Company made no attempt to learn the facts and 'deliberately shut its eyes to the facts * * * and as-

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[54] *N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468, 471-472 (C.A. 7); *Snow & Sons*, 134 NLRB 709, enforced, 308 F.2d 687 (C.A. 9); *N.L.R.B. v. Overnite Transportation Co.*, 308 F.2d 279, 283 (C.A. 4); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 179 (C.A. 2), cert. denied, 370 U.S. 919; *N.L.R.B. v. Decker*, 296 F.2d 338, 341-342 (C.A. 8); *N.L.R.B. v. Wheeling Pipe Line*, 229 F.2d 391, 392-393 (C.A. 8); *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914.

[55] Sec. 8(a)(5); cf. Sec. 2(4), defining "representatives."

siduously avoided giving the union any real opportunity to substantiate its claims.'" (*N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468, 472 [C.A. 7].) "Where, as in this case, the union had proof of its majority status readily available and respondent chose not to learn the facts, it 'took the chance of what they might be.' *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 869 (2d Cir.), cert. denied 304 U.S. 576, 585 * * *; *N.L.R.B. v. Dahlstrom Metallic Door Co.*, 112 F.2d 756 (2d Cir. 1940)." (*N.L.R.B. v. Elliott-Williams Co.*, 345 F.2d 460 [C.A. 7].) As in *Economy Food Center, supra*, where Respondent explained its position by saying "We just felt we had a real loyal organization, and they were all happy" (*id.* at 472), here Respondents expressed comparable alleged surprise and chagrin at what they characterized as unwarranted and disloyal action by their employees against them.

> "As said in N.L.R.B. v. Philamon Laboratories, Inc., 298 F.2d 176, 179 (C.A. 2), cert. denied, 370 U.S. 919: 'The act imposes a duty to bargain in good faith upon request whenever a labor organization has been designated by a majority of employees in an appropriate bargaining unit. The employer must recognize and bargain with such an organization whether or not it has been certified by the Labor Board. United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62 * * *; N.L.R.B. v. Sunrise Lumber & Trim Corp., 241 F.2d 620 (2 Cir., 1957), cert. denied 355 U.S. 818 * * *. To be sure, an employer laboring under a good faith doubt as to a union's majority status need not extend recognition. Nevertheless, in the absence of such a doubt, the employer has no vested right to an election. N.L.R.B. v. Trimfit of California, 211 F.2d 206 (9 Cir., 1954).'" (*N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F.2d 750, 755 [C.A. 6], cert. denied, ____ U.S. ____, 60 LRRM 2234 [October 11, 1965].)

And, also as already indicated, if further corroboration is needed as to the absence of the good faith doubt of the Union's status which Respondents profess to have entertained, it may be found in their extensive course of unfair labor practices, as described and found above, carried on by them contemporaneously with such "doubt" on their part.

> "* * * the evidence unmistakably demonstrates that the company gave some credit to the union's claims, for Terminal Manager Gregg and General Manager Price began their course of unlawful interrogations and speeches immediately upon receiving the union's March 25 telegram and March 27 letter, requesting recognition and bargaining. This course of conduct is an absolute refutation of any good faith doubt on the part of the company." (*N.L.R.B. v. Overnite Transportation Company*, 308 F.2d 279, 283 [C.A. 4].)[56]

Respondents' strong indications—such as in their President Amster's letter of May 28 (the day the picketing by pharmacists ended) to all pharmacists (Gen. Couns. Exh. 13)—to its pharmacists that Respondents desired to bargain with them individually instead of collectively, further show the true cast of Respondents' thinking to be that in refusing to recognize, meet or bargain with the Union, Respondents were not motivated by doubt as to the

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[56] Accord: *N.L.R.B. v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958 (C.A. 7); *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289, 291-292 (C.A. 4); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176 (C.A. 2), cert. denied, 370 U.S. 919; *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206 (C.A. 9); *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914; *Maphis Chapman Corp.*, 151 NLRB No. 16, 58 LRRM 1357; *Lone Star Co.*, 149 NLRB No. 67, 57 LRRM 1365; *Marriello Fabrics, Inc.*, 149 NLRB No. 36, 57 LRRM 1310; *Jas. H. Matthews & Co.*, 149 NLRB No. 18, 57 LRRM 1253; *Dazzo Products, Inc.*, 149 NLRB 182; *P. B. & S. Chemical Co.*, 148 NLRB 152.

Union's representative status but rather by unwillingness to deal with a union even if it did in fact represent its pharmacists.[57] As the Court stated recently in *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 921 (C.A. 6): "In cases such as this, where the employer's unfair labor practices are clearly established, both before and after the demand for bargaining, the good faith of his doubts of the union majority may properly be regarded with some suspicion." See also *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2).

Upon the entire record, it is found and concluded that on April 29, 1965 and thereafter at all times when Respondents refused to recognize or bargain with the Union as the authorized collective bargaining representative of a majority of Respondents' pharmacists in a unit appropriate for that purpose:—Respondents did not have a good

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[57] Insinuations attempted to be injected by Respondents at the hearing as to the validity of the designations flowing from the cards themselves are likewise rejected. Aside from the resounding confirmation afforded by the wholesale strike and picketing by its pharmacists, the valid execution of the cards having been established by General Counsel, their utilization by the designated bargaining agent for their presumed purpose flows therefrom. *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 2), cert. denied, 312 U.S. 678. Respondents failed to show that even a single one of the cards was invalidly signed, executed, or delivered for any purpose other than that plainly indicated thereon. The clear wording of the Union cards here—omitting even any mention of use of the card for, or only for, election purposes—renders unnecessary any inquiry into possible legal consequences attendant upon the ambiguity or ambivalent purpose sometimes encountered in such cards, as in *N.L.R.B. v. Peterson Brothers, Inc.*, 342 F.2d 221 (C.A. 5). See: Burger, J., concurring, in *IUE v. N.L.R.B. (S.N.C. Mfg. Co.)*, ____ F.2d ____, 59 LRRM 2232, 2233-2234 (C.A.D.C.); *N.L.R.B. v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958, 963 (C.A. 7); *N.L.R.B. v. Stow Manufacturing Co.*, 217 F.2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964; *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F.2d 917 (C.A. 6); *Gorbea, Perez & Morrell, S. en C.*, 133 NLRB 362, 370, enforced as mod., 300 F.2d 886, 887 (C.A. 1).

faith doubt as to the representative status and authority of the Union, nor any valid basis for such doubt, and did not express any such good faith doubt nor valid basis therefor.

4. Attempt to Dissipate Union Majority; Bypass of Union to Avoid Collective Bargaining.

It is entirely clear from events which have already been described and findings made based thereon, that for practical purposes Respondents' almost every action *vis-a-vis* its pharmacists' union organizational activities was geared to avoidance of collective bargaining, "encouragement" of individual "bargaining," bypass of the Union as collective bargaining representative, and dissipation of the Union's majority representative status. I am thoroughly persuaded upon careful consideration of the record as a whole that this was the case here, and I so find. There is no longer any question that such actions are in violation of the Act. *Joy Silk Mills, Inc., v. N.L.R.B.*, 185 F.2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176 (C.A. 2), cert. denied, 370 U.S. 919; *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289 (C.A. 4).

I find that Respondents attempted to and encouraged their pharmacist employees, while knowing them to be represented by the Union for collective bargaining purposes, to bypass the Union and deal individually with Respondents relative to wages, hours, and other terms and conditions of employment; coercively attempted to induce their pharmacist employees to withdraw their support from the Union, and to deal individually with Respondents; and that Respondents' failure and refusal to bargain with the Union at any and all times on and after April 29, 1965 was not based upon good faith doubt that the Union

represented a majority of its pharmacist employees in an appropriate bargaining unit, but was motivated by rejection of the collective bargaining principle and a desire to gain time to undermine the Union and dissipate its majority status; all in violation of Section 8 (a) (5) and (1) of the Act.[58]

Upon the foregoing findings and the entire record, I state the following:

III. CONCLUSIONS OF LAW.

1. Lane Drug Co., Division of A. C. Israel Commodity Corporation; Lane's of Sylvania, Inc.; Lane's of Bowling Green, Inc.; and Lane's of Oregon, Inc., are affiliated businesses and a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Assertion of jurisdiction in this case is proper.

4. By the conduct set forth in section II which has been found to constitute unfair labor practices, Respond-

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[58] See: *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 218, 219, 234; *N.L.R.B. v. Exchange Parts Company*, 339 F.2d 829, 831 (C.A. 5); *N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468, 471-472 (C.A. 7); *N.L.R.B. v. Crean*, 326 F.2d 391, 396 (C.A. 7); *N.L.R.B. v. Overnite Transportation Co.*, 308 F.2d 279, 283 (C.A. 4); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 179-180 (C.A. 2), cert. denied, 370 U.S. 919; *N.L.R.B. v. Decker*, 296 F.2d 338, 341-342 (C.A. 8); *N.L.R.B. v. Taitel*, 261 F.2d 1, 5 (C.A. 7), cert. denied, 359 U.S. 944; *N.L.R.B. v. Armco Drainage & Metal Products, Inc.*, 220 F.2d 573, 577 (C.A. 6), cert. denied, 350 U.S. 838; *N.L.R.B. v. Stow Manufacturing Co.*, 217 F.2d 900, 904-905 (C.A. 2), cert. denied, 348 U.S. 964; *N.L.R.B. v. Model Mill Co.*, 210 F.2d 829, 830 (C.A. 6); *N.L.R.B. v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482; *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 737, 741 (C.A.D.C.), cert. denied, 341 U.S. 914; *Boot-Ster Mfg. Co., Inc.*, 149 NLRB 933.

ents have interfered with, restrained, and coerced their employees in the exercise of rights guaranteed to them by Section 7 of the Act, and have thereby engaged and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By their April 28, 1965 discharge of, and their failure and refusal at all times since then to reinstate, their employee William P. Nupp, under the circumstances set forth in section II, *supra,* because of his union and other organizational leadership, activities, and affiliation for collective bargaining purposes and other mutual aid and protection, Respondents have discriminated and are continuing to discriminate in regard to the hire, tenure, and terms and conditions of employment of their employees, in violation of Section 8(a)(3) and (1) of the Act; and have been and are interfering with, restraining, and coercing their employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

6. All pharmacists employed by Respondents at their stores located in Greater Toledo (including Toledo, Sylvania, Oregon, and Maumee) and in Bowling Green, Ohio, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act.

7. By failing and refusing to recognize and bargain with the Union, as the duly designated exclusive collective bargaining representative of a majority of their pharmacist employees in a unit appropriate for that purpose within the meaning of Section 9(b) of the Act, Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By their actions inducing employees to deal individually with Respondents in bypass of the Union and derogation of its status as Respondents' pharmacist employees' duly designated exclusive bargaining representative, Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

9. Respondents have committed the acts herein found to constitute unfair labor practices in order to undermine the Union and destroy its majority, and in rejection of the collective bargaining principle, and have thereby engaged and are engaging in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The evidence fails to establish that Respondents threatened their pharmacist employees with discharge or reduced hours in reprisal for Union affiliation or activities.

12. The evidence fails to establish the alleged "Second Defense" set forth in Respondents' amended answers.[59]

IV. THE REMEDY.

I shall recommend the customary cease and desist order and the affirmative relief conventionally ordered in cases of this nature, involving interference, restraint, coercion, discriminatory discharge and refusal to reinstate, and failure to recognize and bargain collectively. My Recommended Order will include a provision requiring

[59] No proof was adduced in support of this affirmative defense (that the Union was in competition with Respondents), which was apparently abandoned by Respondents, and which must in any event fail for lack of proof.

Respondents upon request to bargain collectively with the majority representative of their pharmacist employees. Having found that Respondents have discriminatorily discharged, and have failed and refused to reinstate an employee, I shall recommend that Respondents be required to offer the employee thus discriminated against immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered by reason thereof, by payment to him of a sum of money equal to that which he normally would have earned as wages and other payments, bonuses, emoluments and benefits from the date of such unlawful discharge to the date of Respondents' offer to reinstate him, together with interest thereon, less his net earnings if any during such period, backpay and interest to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716; and that Respondents be required to make available necessary records for computation of backpay. Appropriate provision will be made in the Recommended Order and posted Notice to Employees, for the notification of the discriminatorily discharged employee if he is now in the Armed Forces of the United States, of his right to full reinstatement upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended.

Because of the nature and extent of the unfair labor practices engaged in by Respondents, indicative of an attitude of hostility and continued opposition to basic principles of the Act and the exercise of employee rights guaranteed by the Act, I deem it necessary to recommend that

Respondents be required to cease and desist from infringing in any manner upon the rights of employees guaranteed in Section 7 of the Act.

I shall further recommend that Respondents be required to post an appropriate notice.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following:

RECOMMENDED ORDER.

Lane Drug Co., Division of A. C. Israel Commodity Corporation; Lane's of Sylvania, Inc.; Lane's of Bowling Green, Inc.; and Lane's of Oregon, Inc.; and their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating any employee coercively with regard to his or any other employee's union or other lawful organizational protected concerted activities, desires, or sympathies.

(b) Directly or indirectly soliciting any employee to conduct surveillance and report to Respondents upon the union or other legal organizational protected concerted activity, membership, affiliation, support, or sympathy of any other employee.

(c) Directly or indirectly promising, granting, or holding out to any employee any benefit or thing of value to induce him or other employee to refrain or withdraw from union or other lawful organizational membership, affiliation, sympathy, support, assistance, or activity; or to deal with Respondents individually instead of bargaining collectively.

(d) Directly or indirectly threatening any employee with any economic detriment, loss, disadvantage, reprisal, or retaliation, because of union or other lawful organizational membership, affiliation, sympathy, support, assistance, or activity.

(e) Directly or indirectly interfering with, restraining, or coercing any employee in the exercise of his right to designate and bargain collectively through any labor organization of his choice.

(f) Dealing directly or indirectly with any employee concerning terms or conditions of employment in such a manner as to bypass or derogate from the representative status of the employees' exclusive collective bargaining representative, or with an object of discouraging employees' union affiliation or activities or right of self-organization.

(g) Directly or indirectly threatening to refuse to bargain, or to refrain from bargaining, in good faith with any duly designated collective bargaining representative of its employees.

(h) Discouraging membership in and lawful activities on behalf of Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO, or any other labor organization of their employees, by discharging, laying off, suspending, or failing or refusing to reinstate or rehire, or by threatening to do so, any employee, in violation of the Act, or by otherwise discriminating or threatening to discriminate against any employee in regard to hire or tenure of employment or any term or condition of employment.

(i) Refusing to bargain collectively with Retail Store Employees Union Local 954, Retail Clerks International

Association, AFL-CIO, as the exclusive bargaining representative of their employees in the following appropriate unit:

> All pharmacists employed at the Employer's stores located in Greater Toledo (including Toledo, Sylvania, Oregon, and Maumee) and in Bowling Green, Ohio, excluding all other employees, guards, and supervisors as defined in the Act.

(j) Interfering in any other manner with, or restraining or coercing, any employee in the exercise of his right to self-organization, to form, join, or assist any labor organization; to bargain collectively through representatives of his own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Offer William P. Nupp immediate, full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay, in the manner set forth in "The remedy" section of this Decision. In the event Nupp is presently serving in the Armed Forces of the United States, notify him of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decision.

(c) Upon request, bargain collectively with Retail Store Employees Union Local 954, Retail Clerks International Association, AFI-CIO, as the exclusive bargaining representative of Respondents' employees in the unit found appropriate with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(d) Post in each of their drug stores in Greater Toledo (including Toledo, Sylvania, Oregon, and Maumee) and in Bowling Green, Ohio, copies of the notice attached hereto marked "Appendix B."[60] Copies of said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by Respondents' authorized representatives, be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

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[60] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(e) Notify said Regional Director, in writing, within 20 days from receipt of this Decision and Recommended Order, what steps have been taken to comply therewith.[61]

I further recommend that the complaint be and the same is hereby dismissed as to all violations alleged but not herein found, and that Respondents' "Second Defense" contained in their Answers be and the same is hereby dismissed.

Dated at Washington, D. C.

STANLEY N. OHLBAUM,
Trial Examiner.

APPENDIX A.

CHRONOLOGY.

August, 1961. Nupp enters Respondent's employ.

November, 1964. Pharmacist Nupp (assisted by Pharmacists Molnar, Nemetz, and Ritner) commences contacting other Lane pharmacists, with a view toward organizing them for collective bargaining.

December 22, 1964 (apx.). Lane Vice-President Kaye interrogates Pharmacist Nupp re union organizational activities of Lane pharmacists; urging Nupp to discontinue such activity and to bargain on an individual basis, Kaye offers Nupp a manager's job in a new store.

December 26, 1964 (apx.). Lane Vice-President Kaye returns to see Pharmacist Nupp with assurances of economic benefits to Lane pharmacists and additional benefits to Nupp personally for refraining from union organizational activity and from attempts to bargain collectively.

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[61] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondents have taken to comply herewith."

January, 1965. Lane Vice-President Kaye tells Pharmacist Nupp, among other things, that he request a salary increase and a $15,000 personal loan—which Kaye had suggested previously to Nupp in the context of urging Nupp to cease his union organizational activities—from Respondent by writing to its President Amster in Cleveland.

February (early).* At suggestion of Lane Vice-President Kaye, Pharmacist Nupp writes letter requesting $14,000 loan from Respondent.

March 1 (apx.). Lane Vice-President Kaye informs Pharmacist Nupp that Respondent would lend him only $4500 and asks Nupp if the pharmacists are "happy."

March 15-25 (apx.). Pharmacist Nupp actively resumes organizational activities among Lane pharmacists.

March (late)—April (early). Pharmacist Nupp forms organizational committee of Lane pharmacists, which meets at Lido Lanes and decides upon union representation.

April 10 (apx.). Lane General Manager Pethke calls Pharmacist Nupp a "trouble maker," in effect accuses him of stirring up discontent among Lane pharmacists, and tells him he cannot have the loan he was promised or thought he was promised by Lane Vice-President Kaye.

April 13-16 (apx.) Union Representative Leedy is contacted by Pharmacist Nupp re Union representation of Lane pharmacists.

April 20 or 21 (apx.). Pharmacist Nupp, accompanied by Pharmacists Eisenhauer, Ritner, and 2 or 3 others, confers with Union Representative Leedy at Union office, re Union representation for collective bargaining. Larger

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* 1965 unless otherwise specified.

organizational meeting of Lane pharmacists is set for April 28 at Lido or Westland Bowling Lanes or Alleys.

April 21-28. Pharmacist Nupp makes arrangements for mass meeting of Lane pharmacists at Westland Bowling Alleys or Lanes, and personally notifies 18-20 Lane pharmacists thereof, including fellow-pharmacist Newhard of his own store on the evening of April 27.

April 28 (A.M.). Pharmacist Newhard, working at the same Lane branch drugstore as Pharmacist Nupp, tells Manager Clark of that store that he has received an invitation from Pharmacist Nupp to a Union meeting to be held that night.

(9:30 P.M.). 2. Respondent discharges Pharmacist Nupp, effective immediately.

(10:00 P.M.). 3. Union organizational meeting of approximately 20 Lane pharmacists is held at Westland Bowling Lanes or Alleys, pursuant to arrangement made on or about April 20. 16 Union membership application cards are signed at this meeting; and Pharmacist Nupp and 2 or 3 others are selected as a committee.

April 29. Union sends Respondent telegram advising that it represents a majority of Lane pharmacists in Greater Toledo and Bowling Green, and desires to meet to bargain collectively on their behalf.

April 30 (apx.). Union receives 1 additional Union membership application card from Lane pharmacist, turned over by Pharmacist Nupp.

April 30—May 7 (apx.). Lane pharmacists are interrogated and invited by Respondent to deal directly with it instead of through a union.

May 3. Union files charge against Respondent, alleging violations of NLRB Sec. 8(a)(1), 8(a)(3) (discharge of Nupp), and 8(a)(5).

May 4. 1. Union sends Respondent telegram again demanding recognition as bargaining representative of Lane pharmacists in Toledo and Bowling Green, and again expressing desire to meet for collective bargaining; stating that "As evidence of our good faith we are willing to prove our majority through the facilities of the Toledo Labor Management Citizen Committee."

2. NLRB 8th Regional Director forwards copy of Union's May 3 charge to Respondent; received by Respondent on May 6.

May 6 or 7. Union organizational meeting of about 20 Lane pharmacists is held at Lido Lanes; 2 additional Union membership application cards are turned over to Union by Pharmacist Nupp.

May 12. 1. Respondent's attorney writes Union, in reference to Union's April 29 and May 4 recognitional-bargaining telegrams, that Company has "reason to doubt" Union's majority status and has on this date filed an election petition with NLRB.

2. Respondent through counsel files Representation petition with NLRB (Case No. 8-RM-420) based upon unit consisting of "Approx. 25" employees, being "All pharmacists employed by the Employer at its drug stores in Toledo, Ohio, and vicinity. Excluded all other employees and guards and supervisors as defined in the Act." Petition further alleges that "Request for recognition as Bargaining Representative was made on April 29, 1965 and Employer declined recognition on or about * * *."

May 13. Union organizational meeting of about 20-23 Lane pharmacists is held at Union hall. Group votes unanimously to strike the following morning because of Respondent's failure to recognize Union or bargain col-

lectively and because of its discharge of Pharmacist Nupp (leader of the organizational activity).

May 14-28 (apx.). Lane pharmacists are out on strike, with 16 of them picketing about 10 Lane drugstores. Urging them to return, Respondent attempts to deal with them individually and to persuade them not to attempt to bargain through the Union.

May 27. In presence of Union Representative Leedy, Union counsel Kohler makes further demand on Respondent (through its Vice-President Kaye) for recognition and bargaining. Respondent (through Kaye) refuses, stating merely, "We want an election."

May 28. Lane President Amster writes Lane pharmacists that (*inter alia*) he "was greatly surprised to learn that any of our Pharmacists would want to join the Retail Clerks Union. I never considered Pharmacists as 'retail clerks.' * * * I also cannot understand how any outsider, such as a Union organizer who knows nothing about Pharmacy could discuss your problems or ours. * * * I do not intend to change at this late date in my life. If people working with me have problems, they are my problems too—and as long as I am able to talk to them *directly*, instead of through a go-between, I will want to help them. * * * I will *not* talk to any Union organizer or outsiders."

June 1. Respondent through counsel executes and NLRB 8th Regional Director approves, requests withdrawing Representation petition filed by Lane on May 12 (Case No. 8-RM-420).

June 11. Union files amended charge against Respondents, alleging violations of NLRB Sec. 8(a)(1), 8(a)(3) (discharge of Nupp), and 8(a)(5).

June 14. NLRB 8th Regional Director forwards copy of Union's June 11 amended charge to Respondents; received by Respondents on June 15.

June 17. NLRB 8th Regional Director issues complaint and notice of hearing herein, based upon Union's May 3 charge as amended June 11; served June 17, received June 18.

July 13. Respondents file answers to complaint herein.

July 27. Union counsel Finley writes Respondents' counsel that Union's recognitional and bargaining request is still in effect.

August 3. Respondents file amended answers to complaint herein.

August 6. Respondent moves before NLRB 8th Regional Director for pretrial discovery deposition re affirmative defense in its amended answer; application denied by Regional Director on August 9.

August 16-17. Respondents move to dismiss complaint on ground no proper demand for recognition has been made and that appropriate unit should first be determined by NLRB in a Representation case hearing; General Counsel cross-moves to amend and clarify complaint. (At hearing herein, Respondents' motion denied and General Counsel's cross-motion granted.)

August 18. Respondents through counsel file Representation petition with NLRB (Case No. 8-RM-430), based upon unit consisting of "Approx. 40" employees, being "all pharmacists employed by the respective employers [Lane Drug Co., Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc., Lane's of Oregon, Inc., Lane's of Fostoria, Inc.] in their drug stores and the Lane Drug

Company warehouse in Toledo, Sylvania, Fostoria, Oregon and Bowling Green, Ohio; and excluded all other employees and guards and supervisors as defined in the Act." Petition further alleges that "Request for recognition as Bargaining Representative was made for partial unit on April 29, 1965 and Employer declined recognition for different unit on or about May 5, 1965, and for a still different unit on July 27, 1965."

August 24. NLRB 8th Regional Director dismisses Respondents' Representation petition filed on August 18 (Case No. 8-RM-430), because of (1) pendency of complaint herein charging Respondents with refusal to bargain, in violation of NLRA Sec. 8(a)(5), and (2) the fact that "the Union has not demanded recognition for the employees of Lane's of Fostoria, Inc." Regional Director notifies Respondents of right to review of this action.

APPENDIX C.

STATUTES.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.) are as follows:

Unfair Labor Practices.

Sec. 8. (a). It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

Prevention of Unfair Labor Practices.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

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JUN 26 1968

In the Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968.

No. ---233

LANE DRUG CO.,
A Division of A. C. Israel Commodity Corporation,
LANE'S OF SYLVANIA, INC.,
LANE'S OF BOWLING GREEN, INC.,
and
LANE'S OF OREGON, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
and
RETAIL STORE EMPLOYEE'S UNION LOCAL 954,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

LEONARD LANE,
ALAN ARNOLD,
300 Chester-Twelfth Building,
Cleveland, Ohio 44114,
Attorneys for Petitioners.

Of Counsel:
LANE, KROTINGER, SANTORA, STONE & PURDY,
300 Chester-Twelfth Building,
Cleveland, Ohio 44114.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

LANE DRUG CO.,
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LANE'S OF SYLVANIA, INC.,
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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
and
RETAIL STORE EMPLOYEE'S UNION LOCAL 954,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioners petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit holding that the petitioners violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, the writ to issue only in the event that this Court should grant a petition for a writ of certiorari to either or both of the respondents.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 18-32) is reported in 391 F.2d 812. The Board's decision and order (Appendix C, *infra*, pp. 33-37; J.A.[1] 605-09), including the trial examiner's decision (J.A. 529-605), are reported at 160 N.L.R.B. 1147.

JURISDICTION.

The opinion of the Court of Appeals was entered on March 29, 1968. A decree (Appendix B, *infra*, p. 32) was entered on the same date. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) (1964).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board may, consistent with Fifth Amendment due process and the Federal Administrative Procedure Act, deprive a respondent of an impartial investigation and unbiased determination whether a complaint should issue in an unfair labor practice proceeding, by committing the investigation of the charge into the hands of the very individual who would act as complaint counsel at a trial on the merits.

2. Whether the court below committed error in upholding a decision of the Board that the petitioners violated section 8(a)(1) and (3) of the National Labor Relations Act, when the evidence indicates that the dual role of the investigator-prosecutor caused said representative, while acting as investigator, to use that position to bolster the case which he would present when he changed his function from investigator to complaint counsel.

3. Whether the court below properly held that the employer violated section 8(a)(1) of the National Labor

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

Relations Act, when the sole basis for such finding was a factual conclusion without basis in the record and without foundation in findings of the Board or the trial examiner, namely, that the employees were "promised benefits if they would deal with the employer directly." 391 F. 2d 812, 818.

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment V of the Amendments to the Constitution of the United States provides in pertinent part:

> "[N]or shall any person * * * be deprived of life, liberty, or property without due process of law. * * *"

STATUTES INVOLVED.

The statutes involved are various sections of the National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. sec. 151-67, 171-82, 185-87 (1964), and section 5(c) of the Administrative Procedure Act, 60 Stat. 239 (1946), reenacted, 5 U.S.C.A. 554(d) (1967). Relevant portions of these laws are set forth in Appendix D, *infra*, pp. 37-39.

STATEMENT OF THE CASE.

The petitioners (sometimes referred to hereinafter as the "employer") are a group of affiliated and closely held corporations constituting a single employer (G.C.[2] Ex. 4; J.A. 498) and operating seventeen retail drug stores localized in the Toledo, Ohio, area. The unfair labor practice charges filed with the Board on May 3, 1965 (G.C. Ex.1-A; J.A. 2-3) and amended on June 11, 1965 (G.C. Ex. 1-C;

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[2] "G.C." refers to exhibits offered by General Counsel of the Board.

J.A. 3-5) followed efforts by Local 954, Retail Clerks International Association AFL-CIO (hereinafter referred to as the "union") to organize the pharmacists in petitioners' drug stores.

On June 17, 1965, the Eighth Regional Office (Cleveland, Ohio) of the Board issued a complaint and notice of hearing (G.C. Ex. 1-E; J.A. 3-12) taking up each of the unfair practice charges asserted by the union. These charges included alleged violations of section 8(a)(1), (3) and (5) of the National Labor Relations Act,[3] 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158(a) (1), (3), (5) (1964).

Prior to the inception of the hearing before the Board's trial examiner, the petitioners raised by motion the due process and statutory question whether the prosecution could proceed when the determination to file a complaint was made by an investigator who used his position to obtain only certain limited information with the knowledge that he would be complaint counsel and that he would recommend prosecution (Resp.[4] Ex. A; J.A. 37-42). At the hearing, this motion was renewed orally, including the presentation of evidence in support thereof (J.A. 43-50).

On April 26, 1966, the Board's trial examiner filed an opinion (160 N.L.R.B. 1147, 1150-84; J.A. 529-605) which sustained the charges of the union in their entirety. On September 15, 1966, the Board, although it did not agree with certain of the key fact findings of the trial examiner, affirmed his decision (Appendix C, *infra* pp. 33-37; 160 N.L.R.B. 1147; J.A. 605-09). Although the issue raised by the motion was vigorously presented to the Board as a ground for reversing the examiner's de-

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[3] Sometimes referred to hereinafter simply as the "Act."

[4] "Resp." refers to the exhibits offered by the petitioners herein, who were respondents in the hearing before the Board.

cision, the Board did not discuss the constitutional and statutory questions raised therein.

Once again, on petition by the employer to review, filed with the United States Court of Appeals for the Sixth Circuit pursuant to section 10(e) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. sec. 160(e) (1964), the employer advanced the issue of procedural due process and proper administrative procedure as one of the grounds for reversing the decision of the Board. Brief for Petitioners, pp. 71-73; Reply Brief for Petitioners, pp. 17-18. On March 29, 1968, that court rendered a unanimous opinion (Appendix A, *infra*, pp. 18-32; 391 F.2d 812) in which it overruled the Board and found that the General Counsel had *not* sustained his burden of proving bad faith in the refusal to honor the union's claims of majority representation. 391 F.2d 812, 818-20. The court below also ruled that there was no coercion in the interviews conducted by the employer to determine the validity of these claims. 391 F.2d at 817-18.

The court below did, however, uphold the ruling of the Board that the petitioners had violated section 8(a)(1) of the Act in that "the pharmacists were * * * promised benefits if they would deal with the employer directly." 391 F.2d at 818. The only evidentiary basis for this holding was that Mr. Nupp, the discharged pharmacist, was offered "an increase in salary." *Ibid.* These facts, however, appear nowhere in the record, the findings of the trial examiner, or the decision of the Board.

Moreover, in making its ruling of section 8(a)(1) violation, and in holding that pharmacist Nupp was discharged solely because of his union membership, the court below did not in any way consider the constitutional and procedural improprieties and errors referred to above. It is these two basic errors in the rulings adverse to these petitioners which serve as the basis for this petition.

REASONS FOR GRANTING THE WRIT.

A. The "dual capacity" of complaint counsel violated the due process clause of the Fifth Amendment.

The court below ruled that the petitioners have violated section 8(a)(1) and (3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158 (a)(1), (3) (1964), without considering a unique and extremely important question of constitutional law and federal administrative procedure. When complaint counsel for the Board undertook to act as an impartial investigator, in reality, he was building his case for the prosecution. This dual role violated the constitutional rights of the petitioners to due process of law. U.S. Const. amend. V.

It is not simply a matter of demonstrating that these specific petitioners in this specific proceeding were prejudiced by the partial role of the dual-capacity investigator, although it will subsequently be developed that there is ample evidence to support this proposition. Petitioners submit that administrative agencies may not, consistently with the due process clause, commit the investigation of the charge into the hands of the very individual who will act as complaint counsel at a trial on the merits. Under such circumstances, a dispassionate and impartial evaluation would seem to be beyond the expectations of human nature.

Recently, Fifth Amendment Due Process has become synonymous with the concept of fundamental fairness. The latest decisions, moreover, reveal a trend to require not only proof of substantial fairness, but the avoidance of even the appearance or probability that unfair processes will pervade the proceeding. The trend began with this Court's decision in the case of *In re Murchison*, 349 U.S. 133, 136 (1955), where it was held:

"Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

When the investigation has been unfairly or improperly conducted, it is extremely difficult to prove as a matter of evidence that prejudice resulted. The procedure attacked here, however, "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas,* 381 U.S. 532, 542-43 (1965). Such circumstances leave no choice but to require the appearance of impropriety to prevail and to invalidate the entire prosecution which follows it. See *Parker v. Gladden,* 385 U.S. 363, 365 (1966) (per curiam).

Recently, the police commissioner of the City of New York ruled that a police investigator in a prostitution case (which is considered neither a misdemeanor nor a felony under New York law and which, therefore, raises an appropriate parallel) may not act as the prosecutor in subsequent court proceedings. Overruling a practice of thirty years' standing, the Commissioner stated: "Where the arresting officer and the prosecutor are in a sense but one, the theory of checks and balances fails in a very significant area." [5] "Rules and regulations made by government agencies in order to be valid must have a rational basis." *Coakley v. Postmaster of Boston,* 374 F.2d 209, 210 (1st Cir. 1967).

Further, in the administration of military justice, there has been recognition of procedural impropriety, from a constitutional as well as a statutory standpoint, of combining in one person the simultaneous roles of investigator and trial attorney for the agency. Thus, in

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[5] New York Times, May 21, 1967 (Sunday), p. 2E.

Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *rev'd sub nom. Humphrey v. Smith*, 336 U.S. 695 (1949),[6] although the statute only required, as the Board also requires, that the investigation be conducted impartially, it was held that a cooperating investigator could not also act as assistant judge advocate. It is important to note that, in the *Smith* case, the facts were much less favorable to the party prosecuted than are the facts herein, since the "investigator" in *Smith* conducted very little, if any, of the pretrial interrogation and apparently did not actively participate in the trial.

To the same effect is *Hicks v. Hiatt*, 64 F. Supp. 238, 249 (M.D. Pa. 1946), where the court recognized that the accused in a military hearing must rely upon an impartial investigative technique because he does not have complete access to the witnesses. Much the same observation would apply to the respondent in an unfair practice proceeding.

And in *Henry v. Hodges*, 76 F. Supp. 968, 973-74 (S.D.N.Y. 1948), *rev'd on other grounds*, 171 F.2d 401 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949), the court held that, as a matter of law, an accused in any proceeding is entitled to an impartial investigator. Speaking of an investigator who knows that he will act for the prosecution, the court asked:

> "Can we reasonably hope that such investigator will pursue interrogation and examination of proposed witnesses with the same zealous and unbiased effort as one who has had no previous contact with the case? The answer to those questions is obvious. It is manifestly impossible for him to conduct the thor-

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[6] Although this Court reversed the court of appeals by a 6 to 3 vote, the basis for the reversal was a jurisdictional issue, and apparently the question of proper procedure as a constitutional proposition was not directly raised. 336 U.S. at 697.

ough and impartial investigation contemplated and directed by Act of Congress."

But, if there was ever any doubt as to Congress' intent that the impartial investigator must be excused from participating in the hearing on behalf of the agency, that doubt was finally resolved by the passage of article 27(a) of the Uniform Code of Military Justice, 10 U.S.C. sec. 827(a) (1964), which provides that "no person who has acted as investigating officer * * * may act later as trial counsel [or] assistant trial counsel * * *."

There is still a further practical ground for the unconstitutionality of allowing the administrative investigator to assume less than an unbiased position. The theory of this Court's holding in *Jencks v. United States*, 353 U.S. 657 (1957) is that the person accused by a federal authority of violating federal law should have the opportunity to read the statement which embodies the entire story of an accusing witness, since "the omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment are * * * relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Id.* at 667. Without such adequate cross-examination, said the Court, justice will not be done, for it is the goal of the government " 'not that it shall win a case, but that justice shall be done. * * *.' " *Id.* at 668, quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

This rule, and the reason for it, is no longer restricted to criminal prosecution. The Board, recognizing its validity in labor cases, has adopted it (*N.L.R.B. v. Arkansas-Louisiana Gas Co.*, 333 F.2d 790, 798 (8th Cir. 1964)), in section 102.118 of its regulations, 29 C.F.R. sec. 102.118 (1968).

If, however, the investigator is not impartial, he will inevitably take down less than the full story; or, if he is certain that the witnesses will insist upon inserting facts adverse to the prosecution, he will not write up statements at all. In other words, a partial investigator cannot help but limit the rights of the accused respondent under the *Jencks* decision and under the policy which more recently has applied that decision to non-criminal, administrative cases.

B. There is evidence that, in this case, the dual capacity of complaint counsel operated to the prejudice of the petitioners.

The record before the Board and the court below adequately indicates that, as petitioners contend, when complaint counsel also attempts to assume the role of investigator and to determine whether a complaint should issue, this perversion of administrative process necessarily operates to defeat justice.

Some reference to the background of this litigation is necessary to reveal how such dual capacity will inevitably lead to the issuance (or non-issuance as the case may be) of complaints regardless of the evidence.

On the night of April 28-29, 1965, an organizational meeting was held (160 N.L.R.B. 1147, 1157; J.A. 545). On the day the meeting ended, the union organizer made a claim of authorization cards from a majority of the pharmacists of the employer and demanded to bargain as a representative of those pharmacists (G.C. Ex. 5; J.A. 499). The employer, mindful of a past similar claim of majority status by the same union in which a Board-supervised election yielded a 154 to 28 vote against the union (Resp. Ex. G-3; J.A. 335-36, 528), conducted a survey of its pharmacists over the ensuing Friday and Saturday which

the court below found to be non-coercive (391 F.2d at 817-18). This investigation revealed no evidence of majority representation, and in fact indicated the contrary (J.A. 431-35).

However, on the very next business day, Monday, May 3, the union filed an unfair labor practice charge based in part on the refusal of the employer to bargain with the union (G.C. Ex. 1-A; J.A. 2-3). Ultimately, the Board found that this charge was based on an invalid demand to bargain, since the union did not possess a majority of the authorization cards immediately after the meeting of April 29 (160 N.L.R.B. 1147, 1150; J.A. 608).

An impartial investigation would have revealed the impropriety, ultimately vindicated by the court below, of the section 8(a)(5) charge. An impartial investigation would have revealed, as it developed at the hearing, that some of the authorization cards were "back-dated" and therefore were of questionable value in establishing a very close claim of majority representation (J.A. 84-85, 109, 252-53). An impartial investigation would have shown that the union organizer—with knowledge of the lack of majority status—did not want an election and actually sought to avoid one (J.A. 96-97). Development of these facts prior to issuance of the complaint would have put an entirely new light on the decision to prosecute. Certainly, the lack of a valid claim of majority on May 3 should have been apparent from the face of the authorization cards themselves.

Yet, with all of these defects in view, the Board issued a complaint and notice of hearing on June 17, 1965, taking up every one of the unfair practice charges asserted by the union (G.C. Ex. 1-C; J.A. 3-12).

There are many other facts in the record indicating that the investigator-turned-prosecutor could not handle

the former role with impartiality. There is ample evidence in the record of the predetermination to issue the complaint[7]—its issuance became a mere formality. This is revealed, not only in (1) the partisan choice of witnesses to be interviewed (J.A. 46) and (2) the announced determination before completing the investigation that the matter should be prosecuted (J.A. 49-50), but also by (3) the interlineation of dates in the affidavits of two of the Board's key witnesses (Resp. Ex. D-1 through D-3; J.A. 204, 217, 481).

An example of the distortion in fundamental fairness that can arise from combining the roles of investigator and prosecutor is reflected in certain public records called to the attention of the court below.[8] For it later developed that some of the same pharmacists whose testimony was used by the Board to make out its prosecution of anti-union motive in the discharge of pharmacist Nupp, and whose every word was believed in preference to that of employer witnesses without exception, later filed section 8(a)(3) charges of their own. These charges, which theoretically should have involved the same issues of anti-union motive, were summarily dismissed by the Board,

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[7] For example, complaint counsel spoke only to two management witnesses, while contacting a vast majority of the union protagonists whose testimony later formed the entire basis for the Board's case (J.A. 46). Had he talked to management witnesses, especially those in supervisory capacities, the investigator would have discovered the gross inadequacies and improper behavior of the discharged pharmacist, William Nupp, and would not have suggested that the issue of anti-union discrimination could be dropped if the petitioners would only rehire Mr. Nupp (J.A. 41).

Further, it was not until complaint counsel, posing as an impartial investigator, gained the confidence of petitioners' attorneys (J.A. 42) that he revealed his conviction that the case should be tried (J.A. 49-50).

[8] Employer's reply brief in the court below, p. 17.

with prejudice, and without the filing of a complaint. N.L.R.B. Letter Rulings, Region 8, Nos. 8-CA-4248 (Henry Pietras) July 21, 1966; 8-CA-4230 (Carl Eisenhauer) June 30, 1966; 8-CA-4232 (Harry Maza) May 25, 1966; 8-CA-4078 (Joseph Cousino) Dec. 27, 1965.

The instant investigation and its fruits permeated the entire process,[9] from issuance of complaint through the ruling of the Board and its ultimate affirmance in part by the court below. The biased investigation which initiated these proceedings violated the due process requirement of the Fifth Amendment and both the spirit and letter of the Federal Administrative Procedure Act.

C. The dual capacity of complaint counsel further violated statutory administrative procedure.

Much the same observations applicable to the due process clause apply with respect to the Board's obligation to abide by the requirements of the Federal Administrative Procedure Act. The Board has never been exempted from that statute, sec. 2(a), 60 Stat. 237 (1946), reenacted, 5 U.S.C.A. sec. 551(1) (1967). Section 10(e)(B)(5) of that law, 60 Stat. 243 (1946), reenacted, 5 U.S.C.A. sec. 706(2)(E)(1967), provides that a reviewing court may set aside agency action only when it is "unsupported by substantial evidence." This restriction has been interpreted to mean that the federal courts may uphold the finding of an administrative agency, although opposed to the preponderance or the weight of the evidence, so long as there

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[9] For example, despite the abundant doubts whether there was bad faith in the rejection of the bargaining demand, and despite the results obtained in a prior election when the same union similarly claimed a majority of cards (Resp. Ex. G-1 through G-3; J.A. 526-28), the Eighth Regional Office of the Board denied a petition filed by the employer to conduct a representation election (G.C. Ex. 2-B, 2-D; J.A. 492, 494).

is some substantial evidence in the record to support it. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). This standard was carried forward specifically into the statute providing for review of Board decisions. Act sec. 10(e), 49 Stat. 453 (1935), as amended, 29 U.S.C. sec. 160(e) (1964).

It seems certain that Congress, in giving so much finality to the findings of administrative agencies, gained the impression and proceeded upon the assumption that the impartial investigation technique would be employed in the public interest. Otherwise, an agency being at liberty to go against the preponderance of the evidence without the intervention of the federal courts, could instruct or permit its investigator to adduce and present only enough "substantial evidence" to support a finding adverse to the respondent. On the other hand, with a full and fair investigation, the respondent will have at least one opportunity to have all of the evidence weighed and to avoid the inconvenience and expense of agency prosecution, and the risks of liability ensuing therefrom, if the preponderance of the evidence does not support the charge before the agency.

The Board itself has recognized this statutory duty to conduct the preliminary investigation with impartiality. Its officials have stated that the administration of its procedures "must be impartial and even-handed in reality as well as just in appearance." Rothman, *Office of the General Counsel of the N.L.R.B.*, 12 Labor L.J. 698, 699 (1961). "Harassment by unnecessary litigation" is a recognized evil to be avoided. *Id.* at 714.

There is, moreover, ground for argument that the Administrative Procedure Act specifically, as well as inferentially, prohibits the investigator from in any way assuming

a prosecutive function. Section 5(c) of that statute, 60 Stat. 239 (1946), reenacted, 5 U.S.C.A. sec. 554(d) (1967), specifically prohibits "any officer, employee, or agent" of the Board from engaging "in the performance of investigative * * * functions" while, at the same time, participating in or advising a decision or a recommended decision.

True, complaint counsel did not participate in the decision of the trial examiner or the Board on the merits of the charge. But he did engage in a "decisional function" [10]—and a very important function, indeed. For upon his decision rested the right of these petitioners to be free from the expensive and time-consuming prosecution herein, ultimately found to be at least partially unjust by the court below.

It does no good to excuse an unlawful procedure on the ground that it "is not unusual" or because "that's the way the Board functions" (J.A. 48).[11] The boundaries of due process and lawful procedure cannot be established by repetition of an unconstitutional and unlawful practice.

D. The holding of the court below with respect to section 8(a)(1) is based exclusively on an erroneous fact finding.

The court below committed two errors in confirming the Board's finding that the employer violated section 8(a)(1) of the Act. The first error, explained above, was in sanctioning the unconstitutional and unlawful adminis-

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[10] Language of Board brief in the court below, p. 52.

[11] These excuses were given by the trial examiner in rejecting the motion of the petitioners, in the alternative, either to dismiss the prosecution or to disqualify complaint counsel (Resp. Ex. A; J.A. 37-42).

trative procedures of the Board which produced the section 8(a)(1) prosecution.

The second error was in the court's fact-finding in support of its section 8(a)(1) ruling. The court below did not find coercive interrogation—in fact, it found no interference with any organizational rights of the pharmacists except that certain promises of benefits were made to them by the employer. 391 F.2d 812, 817-18. The finding that benefits were granted is completely without support in the record before the trial examiner and the Board and therefore cannot be sustained. *N.L.R.B. v. United Steelworkers,* 357 U.S. 357, 364 (1958).

The only factual basis cited in support of the court's ruling that benefits were offered is a statement that Nupp was promised an increase in salary. 391 F.2d at 818. The best that Nupp claimed was that he was offered a position as a store manager, although he did not want the job (J.A. 228). The record stands uncontradicted, however, that this was an offer of no benefit at all—merely an additional burden. For the pharmacist-managers and pharmacist-assistant managers in the petitioners' marketing system received precisely the same base pay, bonuses, vacation benefits, hours of employment, sick pay considerations, and other fringe benefits as their fellow non-managing pharmacists (J.A. 179, 185-88).

There also is not a shred of evidence in the record that any representative of the employer offered any pharmacist any raise or other additional fringe benefit after the employer learned of the organizational activity. Indeed, there is evidence to the contrary (J.A. 160, 439).

E. Summary.

The employer recognizes that the aspects of this case set forth herein might not be sufficiently important to

warrant an independent petition for certiorari, despite the importance of a proper construction of the constitutional, statutory, and judicial review issues listed herein. But if the Court determines to grant a petition for certiorari filed by the Board or the union, or both, the employer believes that the Court should review the entire case and correct the plain errors of the court below with respect to the sections 8(a)(1) and 8(a)(3) findings. Accordingly, the employer is filing this petition.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that, in the event the Court should grant a petition for a writ of certiorari either to the Board, the union, or both, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

LEONARD LANE,
ALAN ARNOLD,
300 Chester-Twelfth Building,
Cleveland, Ohio 44114,
Attorneys for Petitioners.

Of Counsel:
LANE, KROTINGER, SANTORA, STONE & PURDY,
300 Chester-Twelfth Building,
Cleveland, Ohio 44114.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided March 29, 1968.)

No. 17466.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT.

LANE DRUG CO., a Division of A. C. Israel Commodity Corp., Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc. and Lane's of Oregon, Inc.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RETAIL STORE EMPLOYEES UNION LOCAL 954, etc.,

Intervenor.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. The controversy in this case grows out of efforts to organize the pharmacists employed by Lane Drug Co., an Ohio corporation, and its three corporate affiliates, in seventeen drug stores [1] located in Toledo, Ohio and environs.

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[1] The eighteenth store, employing two pharmacists, was opened in Fostoria, Ohio, about two weeks after the union filed the unfair labor practice charge.

The union [2] sought to obtain recognition as exclusive bargaining representative of the pharmacists via the signed authorization card route rather than by means of a Board-conducted election.

The union representative attended a meeting of about twenty of the pharmacists which was called late in the evening of April 28, 1965, when sixteen pharmacists signed authorization cards.

The next day, on April 29, 1965, at 5:42 o'clock P.M., the union sent to Lane Drug Co. a telegram stating that it represented a majority of its pharmacists in greater Toledo and Bowling Green, Ohio stores, and requesting a meeting to negotiate a contract covering wages, hours and working conditions for all pharmacists in the above stores, except those who function in a supervisory capacity. The telegram was received by Lane Drug Co. on Friday, April 30th.

On the following Monday, May 3rd, the union, without waiting for a reply, filed with the Board an unfair labor practice charge against Lane, alleging a violation of Section 8(a)(5) of the National Labor Relations Act as amended, 29 U.S.C. § 151, et seq, for refusal to bargain, and also alleging a violation of Sections 8(a)(1) and 8(a)(3) of the Act. An amended charge was filed on June 11th.

On May 4th the union sent another telegram to Lane Drug Co. repeating its demand for recognition and offering to prove its majority through the facilities of an impartial third party, the Toledo Labor Management Citizens Committee.

Subsequent to the filing of a complaint, a hearing was conducted before the trial examiner, who rendered his

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[2] Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO.

decision holding that Lane and affiliated companies violated Section 8(a)(1) of the Act by interrogating their employees concerning their union activities or sympathies, by soliciting employees to survey and report to them the activities of other employees in behalf of the union, by promising benefits to pharmacist Nupp in order to have him to discontinue his organizational activities, by attempting to deal with strikers on an individual basis, and by stating that the companies would not recognize any union. The examiner expressly found, however, that Lane did not threaten the pharmacists with discharge or reduced hours in reprisal for union affiliation or activities. The examiner further found that Lane violated Section 8(a)(3) of the Act by discharging pharmacist William P. Nupp, and violated Section 8(a)(5) of the Act by refusing to bargain with the union on April 29th and thereafter. He recommended that pharmacist Nupp be reinstated with back pay, that Lane be ordered to bargain with the union, and that appropriate notices be posted.

The Board, in reviewing the examiner's decision, upheld his findings as to Section 8(a)(1), 8(a)(3) and 8(a)(5) violations, but found that he was in error in holding that Lane violated the Act by refusing to bargain in response to the April 29th telegram, because on that date the union with only sixteen cards, did not in fact represent a majority of the appropriate unit of thirty-two pharmacists.[3] The Board held, however, that on May 4th, when the union repeated its demand for recognition, it

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[3] The Examiner had excluded from the bargaining unit pharmacists Waldman and Searle. The Board held that Waldman, a part time employee, should not have been excluded, and that Searle was properly excluded because of lack of community of interest with the other pharmacists. This was not the reason given by the Examiner. By excluding Waldman from the unit, the union lacked a majority.

had acquired an additional card and therefore had a majority of one; that Lane did not have a good faith doubt about this majority; and that Lane was therefore in violation of Section 8(a)(5) by refusing to bargain with the union. The Board pointed out a number of errors in the examiner's decision, which it termed "discrepancies," but held that they did not affect his ultimate conclusion or its concurrence therewith.

Upon consideration of the record as a whole, we agree that there was substantial evidence to support the Board's findings of Section 8(a)(1) violations in the respects hereinafter pointed out, and the findings with respect to the 8(a)(3) violation, but we do not agree that there was substantial evidence to support its finding as to a Section 8(a)(5) violation.

Lane owned and operated a chain of fourteen drug stores in the Toledo area. Its affiliated companies, as indicated by their respective names, operated three additional stores in Sylvania, Bowling Green, and Oregon, Ohio. The eighteenth store was opened on May 18, 1965, at Fostoria, Ohio.

A stipulation was filed at the hearing before the examiner, to the effect that the four separate corporations constituted a single employer within the meaning of Sections 2(6) and (7) of the Act. This was because the corporations had substantially the same officers and directors, with the President and Vice Presidents exercising substantial control over their operations and having centralized purchasing, warehousing and payroll systems. The General Manager of the stores, Pethke, was stationed at Toledo and under him were two nonpharmacist supervisors, Wagenman and Willis, each supervising about one-half of the stores. In each store there was one manager and one assistant manager, some of whom were pharma-

cists, and some were not. A store manager and assistant manager work alternate shifts, so that one of them is in the store at all times.

Ohio law requires pharmacists to be graduates of a recognized school or college of pharmacy, to serve for one year as an intern in a drug store under the supervision of a registered pharmacist, and to pass an examination conducted by the State Board of Pharmacy, in order to obtain a Certificate of Registration. Ohio Rev. Code § 4729.08. The law further provides that a retail drug store shall be "in full and actual charge" of the registered pharmacist. Ohio Rev. Code § 4729.27.

The leader in the organizational movement was pharmacist Nupp, who had been in the employ of Lane since 1961. In the latter part of 1964 Nupp contacted a substantial number of the pharmacists, including pharmacist-managers and assistant managers, to ascertain whether they were interested in forming an organization to deal with the company concerning working conditions. He learned that there was considerable sentiment toward formation of some type of an organization, but there was a difference of opinion as to whether there should be a union "because of professional reasons."

Nupp testified that Vice President Kaye visited him twice at the store where he worked, shortly before Christmas of 1964. Kaye told Nupp that he knew of his organizational efforts and asked him the reason for such activity. Nupp detailed some of the complaints of the pharmacists and Kaye said he would discuss them with the men but that he thought they should bargain only on an individual basis. Kaye told Nupp that he liked him and would like him to become manager of a newly opened store, and that he would prefer that Nupp not continue his efforts to organize a union. Nupp said he was not

interested in becoming a store manager. Kaye told Nupp, in a "cynical" tone according to Nupp, that he [Nupp] did not have to worry about losing his job for what he had done. At the second meeting Kaye repeated substantially the same statements but Nupp did not testify as to any cynicism in this conversation. Kaye added that a pay increase for Nupp could be arranged and that he also might obtain an interest-free loan.[4]

Kaye also interviewed pharmacist Eisenhauer and suggested that Kaye be called on the telephone any time a pharmacist had a grievance.

In January, 1965, Kaye suggested that Nupp write to the Cleveland office and request a $15,000-loan on his own terms. Kaye further told Nupp that he would look into the complaints and would discuss them with the pharmacists. He asked Nupp not to discuss any store problems with fellow employees, but to call him [Kaye] or Manager Pethke. Nupp told Kaye that what Kaye said made him quite happy and that he was satisfied with Kaye's assurances.

After this meeting, Nupp discontinued his organizational activities, and in February, 1965, he made application by letter to the company for a $14,000-loan. In the letter he stated that he and his wife thought it would be more advantageous for them to remain in Toledo rather than go to California. Several weeks later Kaye told Nupp that the company would loan him only $4,500, which Nupp stated was satisfactory; but he nevertheless resumed his organizational activities. He and three other pharmacists held a meeting, at which he was authorized to contact local unions. Around April 10th General Manager Pethke

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[4] Nupp's home was mortgaged in the amount of fifteen thousand dollars. He was interested in obtaining a loan from the company in order to pay off his mortgage.

told Nupp his application for a loan had been denied; that he [Nupp] was a trouble maker; and that Pethke would prefer that he leave the company. Nupp did not leave.

In the middle of April, Nupp contacted the union and arranged a meeting for the 28th of April. Eighteen to twenty pharmacists, including Assistant Manager Rettig, were invited to attend the meeting. There was some interrogation of two pharmacists by supervisors concerning the meeting. In one interrogation Supervisor Portteus told pharmacist Maza, "If I were you, I wouldn't get mixed up with this union activity that Bill Nupp is trying to start."

On April 28th, shortly before closing time around 9:30 p.m., Supervisor Willis discharged Nupp, giving as a reason that another pharmacist wanted to transfer to his store, said pharmacist having been a manager of Store No. 3. The discharge of Nupp was the subject of considerable discussion at the meeting of pharmacists held on April 28th, and undoubtedly had some impact on influencing the sixteen pharmacists to sign the union cards that evening.

After the two telegraphed demands of April 29th and May 4th, the filing of an unfair labor practice charge by the union on May 3rd, and other intervening activities by Lane and the union, Lane wrote to the union on May 12th expressing doubt as to its majority status; and on the same day Lane filed a representation petition with the Board for all pharmacists, except supervisors, employed by it at its drug stores in Toledo and vicinity.[5]

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[5] Lane's petition was later withdrawn. On August 18, 1965 another representation petition was filed in behalf of all four corporate employers. The Board denied this second petition on the ground that an unfair labor practice charge against the companies was pending.

Another meeting of about twenty pharmacists was held on May 13th and they voted to go on strike, which strike lasted for about two weeks. Sixteen pharmacists picketed about ten drug stores. During the strike additional contacts were made with pharmacists by supervisors, requesting that they deal with management individually. The president of the companies wrote to the pharmacists suggesting that if they had problems they should talk with him directly, instead of through a go-between. He also stated that he would not talk to a union organizer or outsiders.

Section 8(a)(1) Violations.

The employer has a right to talk with his employees and to express his views as to whether or not they should join a union. *Jervis Corp. v. NLRB*, ____ F.2d ____ (6th Cir. 1967). This right of free speech prevails, however, only so long as the interrogation is noncoercive. *NLRB v. Welsh Industries, Inc.*, 385 F.2d 538 (6th Cir. 1967).

The interrogation should be viewed in the context that the pharmacists were all college graduates, duly licensed to practice their profession. They had no difficulty in getting employment at drug stores. Some of them worked for other employers. In the light of this fact it is interesting to note that the examiner found that no pharmacist had been threatened with discharge or shortening of his hours of work. The burden was upon the General Counsel to prove that the interrogation was coercive. In our opinion he did not sustain that burden.

The pharmacists were, however, promised benefits if they would deal with the employer directly. The offer to pharmacist Nupp of a loan and an increase in salary is evidence of this. They were asked to prevail on other employees to deal directly with the employer. The em-

ployer told pharmacists that he would not deal with the union. The employer's conduct, in our opinion, constituted an interference with the employee's right to organize, guaranteed under Section 7.

We conclude that substantial evidence supported the Board's finding as to Section 8(a)(1) violations in the respects above noted. *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951).

Section 8(a)(5) Violation.

The findings of violation of Section 8(a)(5) present the important question of whether the employer had a good faith doubt about the union's representation of a majority of employees when the demands of representation were made. If the employer had such a doubt it cannot be found guilty of unlawfully refusing to recognize the union, even though the union actually represented a majority of the employees. *NLRB v. H & H Plastics Mfg. Co.*, ____ F.2d ____ (6th Cir. 1968); *Peoples Service Drug Stores Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *Pizza Prods. Corp. v. NLRB*, 369 F.2d 431 (6th Cir. 1966).

Contrary to the findings of the trial examiner and the Board that there was no reason for Lane to doubt the majority status of the union, we think that several bases for a good faith doubt, which have been judicially recognized, did in fact exist at the time Lane was found to have violated section 8(a)(5). It is clear that the burden of proof was upon the General Counsel to establish the lack of good faith of Lane in refusing to bargain. *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2nd Cir. 1967); *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936, 939-40 (5th Cir. 1965); *Aaron Bros. of Cal.*, 158 NLRB 1077 (1966).

The first basis for a good faith doubt is the fact that Lane officials, as a result of investigations after the first

demand, had received indications from several of its pharmacists that "not many" of them were interested in the union. Supervisor Willis, who had been instructed to make the investigation shortly after the first demand, talked with pharmacists Yarnell, Newhard and Langdon, who had also talked with other pharmacists, and they advised Willis in substance that they did not think many of the pharmacists were interested in the union. Willis testified that these responses were typical of others which he received from pharmacists and store managers. Willis reported to the General Manager that only a few of the pharmacists were interested in the union; that a majority of them were not interested; and that some who signed indicated that they felt they should, or had to. This testimony was not controverted.[6]

A further reason for Lane to doubt the majority claimed by the union, not discussed by either the examiner or the Board, is the fact that on January 15, 1954, the same union had made a written demand to Lane for recognition as bargaining agent for some of its clerical employees, and represented that it had been designated and authorized by a majority of the employees. Lane petitioned the Board for an election, which the Board granted. The result of the election was that out of a total number of 191 eligible voters, the union received only 28 votes, with 154 employees voting against the union. In determining the good faith of the employer, its previous experience with union cards or elections is a factor which is

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[6] The examiner summarized this testimony in his decision but he thought Willis was "unnecessarily evasive and vague about these conversations, incredibly testifying that he 'more or less listened to what they had to say about it' and that he 'didn't really do any questioning as to what took place.' " We see nothing vague, evasive, or incredible about the testimony of Willis concerning what the pharmacists had told him and his report to his superior.

considered. *Peoples Service Drug Stores Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965); *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638 (1st Cir. 1959).

The union was interested in becoming collective bargaining representative of the pharmacists, if this could be accomplished without an election, and apparently in a hurry. The first telegram demanding recognition was sent after business hours on April 29th and was received by the company on Friday, April 30th. Although the company did begin an immediate investigation, the union did not wait for a reply, and on the following Monday it filed an unfair labor practice charge, alleging a Section 8(a)(5) violation for failure to bargain, along with violations of Sections 8(a)(1) and 8(a)(3). In light of the union's erroneous claim of a majority in 1954, and the hurried procedure of the union in attempting to gain recognition on this occasion, it was not unreasonable for Lane to look upon the union's claim of representing a majority of its pharmacists with skepticism, and these two considerations would provide further reason for a good faith doubt.

When the union made its first telegraphic demand, it did not have a majority. It was only by erroneously excluding from the unit a part time employee who the Board found should have been included, that the examiner was able to find a majority existed on April 29th. A few days later the union secured another card and made its second telegraphic demand, which the examiner and the Board both found gave the union a majority of one—a slim margin, indeed. The existence of a majority by a slim margin is also a factor which must be considered in determining whether a good faith doubt existed. *NLRB v. Great Atl. & Pac. Tea Co., supra.* See also *Pizza Prods. Corp. v. NLRB*, 369 F.2d 431, 438 (6th Cir. 1966).

Neither of the bargaining demands (the telegrams of April 29th and May 4th) clearly designated which stores or pharmacists the union claimed to represent. This lack of clarity was an additional reason for Lane to doubt in good faith that the union had the majority that it claimed. The two demands were addressed only to Lane Drug Company. While they mentioned Bowling Green, the demands were not addressed to Lane's of Bowling Green, Inc., which owned and operated the Bowling Green store. Nor were the demands addressed to Lane's of Sylvania, Inc., or Lane's of Oregon, Inc., which owned and operated stores in those cities. The employer was supposed, apparently, to divine whether the union intended to include them.

The Board ruled that all managers and assistant managers-pharmacists were supervisors and hence not includable in the bargaining unit. This was clear after the Board made the ruling, but it was not too clear at the time the demands for recognition were made. Ohio law seems to require that pharmacists be "in full and actual charge of the store." Ohio Rev. Code § 4729.27. This would appear to require that the pharmacists on duty at the time be in charge of the store.

When a manager-pharmacist was relieved by his assistant, the latter was in charge of the store. None of the manager-pharmacists or assistant managers had power to hire or discharge employees, but they were authorized to make recommendations in that regard. The stores were all supervised by two general supervisors, Wagenman and Willis, who visited them daily. One pharmacist testified that the difference between a manager and a nonmanager was that the former had keys to the store and the latter did not. There was no difference in compensation.

One of the pharmacist-managers was invited to attend the organization meeting of April 28. He must have been considered eligible to attend and participate in the union. There was substantial interchange of employees among the stores. There was the problem of whether part time pharmacists, pharmacist-interns, and pharmacists who were on sick leave, but who were still carried on the employer's books as employees, were eligible to be included in the unit. There was a question of eligibility of pharmacist Searle to be included in the unit. Searle was stationed at the warehouse, and his chief function was to order drugs, but he also served in stores as a pharmacist, in emergencies. There was also a question whether pharmacists who left the employ shortly after the demands, and pharmacists who were employed shortly thereafter in the newly opened store, should be included or excluded from the unit.

In addition to demonstrating a further basis for a good faith doubt, all of these questions suggest that the best procedure to be followed in a case of this kind is a Board-conducted election, where the bargaining unit would be determined by the Board and the eligibility of employees fixed at one time, the date of the election. *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964).

Under the circumstances of this case the employer is placed on the horns of a dilemma. If a majority exists and he refuses to recognize it, he violates Section 8(a)(5). This was the ruling of the Board in the present case. On the other hand, if the employer recognizes a union which does not in fact represent a majority, he violates Section 8(a)(1) and 8(a)(2). The Supreme Court so held in *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961), and held further that the employer's good faith was not a defense. Mr. Justice Clark, who wrote the opinion for the Court, said:

> "More [than a Section 8(a)(2) violation] need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith." *Id.* at 739.

It is contended that failure of the employer to accede to the union's offer for a check of authorization cards by a neutral third party, is proof of the employer's bad faith. This is not necessarily so. The use of such cards has been held by the Board to be a "notoriously unreliable method of determining the majority status of a union." *Sunbeam Corp.*, 99 NLRB 546, 550, 551 (1952). An order to bargain, based thereon, has been described as "strong medicine" to be applied only "with restraint". *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78-79 (2nd Cir. 1965). The offer of a check of authorization cards "does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge." *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936, 942 (5th Cir. 1965). See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967); *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965).

The fact that the employer committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) is not of itself sufficient reason to negative a good faith doubt. *Peoples Service Drug Stores Inc. v. NLRB, supra*, at 556. See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967). An 8(a)(1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with a belief in the majority status. An order to bargain, based on an 8(a)(1) violation, will not be enforced. *NLRB v. River Togs, Inc.*, 382 F.2d 198, 207 (2nd Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2nd Cir. 1965).

Finally, the employer urges bias on the part of the trial examiner in his rulings at the hearing, in crediting the testimony of witnesses of the General Counsel most of the time, and in crediting the testimony of the witnesses of the employer hardly any of the time, and also urges bias in the use of intemperate language in his decision. We have considered these claims, but in our judgment they are not sufficient to establish bias.

The order of the Board is enforced with respect to the Section 8(a)(1) violations, approved herein, and enforced with respect to the Section 8(a)(3) violation. Enforcement is denied with respect to the claimed Section 8(a)(5) violations.

APPENDIX B.

ORDER OF THE COURT OF APPEALS.

(Dated: March 29, 1968.)

On petition to review, set aside and on cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board is enforced with respect to the section 8(a)(1) violations, approved in the opinion, and enforced with respect to the section 8(a)(3) violation. Enforcement is denied with respect to the claimed section 8(a)(5) violations.

No costs awarded. Rule 23(4).

Entered by order of the court.

CARL W. RUESS, *Clerk.*

APPENDIX C.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On April 26, 1966, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondents' exceptions. The Charging Party filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the Trial Examiner's findings,[1] conclusions, and recommendations, as modified herein.[2]

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[1] We note the following discrepancies in the Trial Examiner's Decision, which do not affect his ultimate conclusions or our concurrence therewith, as modified herein: (1) Although the Respondents did not admit in their answer that Assistant Store

(Continued on following page)

1. The Trial Examiner found, and we agree, that Respondents violated Section 8(a)(1) of the Act by coercively interrogating employees, promising them economic benefits, enlisting employees to engage in surveillance and to dissuade other employees from supporting the Union, soliciting employees to deal directly with Respondents instead of through a union bargaining representative, and threatening them with economic detriment for continuing their union affiliation or collective-bargaining endeavors.

2. The Trial Examiner also found, and we agree, that Respondents discriminatorily discharged pharmacist William P. Nupp on April 28, 1965, in violation of Section 8(a)(3) and (1) of the Act.

3. The Trial Examiner found that the Union represented a majority of 16 pharmacists in an appropriate unit

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(Continued from preceding page)

Manager Rettig (Reddig) is a supervisor, as the Trial Examiner stated, the record establishes that Rettig is a supervisor, as the Trial Examiner found. (2) Assistant Store Manager Dittman's conversation, about a week before April 28, was with pharmacist Nemetz, and not with pharmacist Molnar, as the Trial Examiner stated. (3) The Trial Examiner, in one instance referred to an unlawful refusal to bargain as a violation of Section 8(a)(3), instead of Section 8(a)(5) of the Act. (4) We find that the conversation between Vice President Kaye and pharmacist Maza, in which Kaye admitted knowing there were 19 pharmacists for, and only 10 against, the Union, occurred on May 9, and not on May 2, as found by the Trial Examiner, for the following reasons: (a) Maza, whom the Trial Examiner credited, testified that it took place on either May 2 or May 9, but in any event on the Sunday following the second scheduled Union meeting which the record indicates was held on May 7; (b) Kaye failed to testify; and (c) we find no merit in Respondents' contention that Kaye was in Oxford, Ohio, on May 9, and therefore could not have been in Toledo, as this contention is based solely on the testimony of Vice President Rivelis, who was not credited in other respects by the Trial Examiner, and there is no showing that Kaye could not, at different times on May 9, have been in both cities, which are approximately 200 miles apart.

[2] The Respondents' request for oral argument is hereby denied as, in our opinion, the record, exceptions, and briefs adequately present the issues and the positions of the parties.

of 31 pharmacists at the time of its original request for recognition and bargaining on April 29, 1965, and that Respondents violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on and after that date. In finding that the appropriate unit consisted of 31 pharmacists, the Trial Examiner excluded pharmacists Searle and Waldman.

Although we agreed with the Trial Examiner's conclusion that pharmacist Searle is properly excluded from the unit, we do not believe the record supports the Trial Examiner's finding that Searle is a supervisor or managerial employee. The only evidence in the record which suggests that Searle is a supervisor is a notice to Respondents' pharmacists posted in its pharmacies more than 2 years ago setting forth general prescription-filling practices and techniques and signed by Searle over the designation "Chief Pharmacist." This designation alone is not sufficient to establish that Searle is a supervisor. Unlike unit pharmacists who fill drug prescriptions in Respondents' retail stores, are supervised by store managers and assistant managers, and who work 88 hours, including Sundays, during 2-week pay periods, Searle works a regular 48 hour, 6-day week, exclusive of Sundays, under the supervision of General Manager Pethke, reviewing and determining appropriate drug merchandise supply levels at Respondents' central drug warehouse which is geographically separate from Respondents' retail drugstores. Once a year Searle visits each retail drug store in Respondents' chain to inventory drug levels. In ordering drugs for Respondents' warehouse, Searle fills out requisitions which are then reviewed by Pethke and forwarded to Respondents' headquarters in Cleveland where they are again reviewed, and sometimes modified, before being sent to drug manufacturers. Searle only occasionally orders

drugs directly from drug manufacturers. In these circumstances, we do not agree with the Trial Examiner that Searle is a managerial employee. However, as Searle's geographical location, hours of work, supervision, and duties are different from those of unit pharmacists, we find that he lacks a sufficient community of interest with those in the unit, and we shall, therefore, exclude him.

The Trial Examiner excluded pharmacist Waldman as a seasonal casual employee. We disagree. The record indicates that from 1957 to 1965 Waldman has regularly worked a substantial number of hours for Respondent in a part-time capacity during winter months from September to April. While employed as a pharmacist, Waldman receives the same pay as other pharmacists and is generally subject to the same working conditions. Although Waldman, pursuant to his usual employment pattern, left Respondents' employ on April 4, 1965, we find that he has a reasonable expectancy of future employment with Respondents and, contrary to the Trial Examiner, that he has a sufficient community of bargaining interests with other unit pharmacists to warrant his inclusion in the unit.

Accordingly, we find that on and after April 29 there were 32 pharmacists, including Waldman, in the unit. As the Union had valid authorization cards from only 16 pharmacists when it initially demanded recognition and bargaining on that date, it did not represent a majority, and the Respondents' refusal to bargain at that time was therefore not unlawful. However, as the Union obtained an additional card on May 3, and renewed its request for recognition and bargaining on May 4, we find that the Respondents' failure to recognize and bargain with the Union on and after May 4 was, as alternatively found by the Trial Examiner, and for the reasons given by him, in violation of Section 8(a)(5) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondents, Lane Drug Co., Division of A. C. Israel Commodity Corporation; Lane's of Sylvania, Inc.; Lane's of Bowling Green, Inc.; and Lane's of Oregon, Inc.; their respective officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Sep. 15, 1966.

FRANK W. MCCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*
(SEAL) *National Labor Relations Board.*

APPENDIX D.

STATUTES INVOLVED.

1. Act sec. 9(c) (1), 61 Stat. 143 (1947), 29 U.S.C. sec. 159(c) (1) (1964):

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—* * *

> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

2. In pertinent part, Act sec. 8(a), 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158(a) (1964):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in sction 157 of this title; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

3. Act sec. 8(c), 61 Stat. 140 (1947), 29 U.S.C. sec. 158(c) (1964):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

4. In pertinent part, Administrative Procedure Act sec. 5(c), 60 Stat. 239 (1946):

(c) The same officers who preside at the reception of evidence * * * shall make the recommended decision. * * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer

* * * shall * * * be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings.

As re-enacted on September 6, 1966, 5 U. S. C. A. sec. 554 (d) (1967), said statute reads as follows:

(d) The employee who presides at the reception of evidence * * * may not— * * *

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 232

RETAIL STORE EMPLOYEES UNION LOCAL 954, PETITIONER

v.

LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, ET AL.

No. 233

LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, ET AL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND RETAIL STORE EMPLOYEES UNION LOCAL 954

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 232, 1a-14a) is reported at 391 F. 2d 812. The Board's decision and order (Pet. App. No. 232, 15a-80a) are reported at 160 NLRB 1147.

JURISDICTION

The decree of the court of appeals was entered on March 29, 1968 (Pet. App. No. 233, 32). The petitions for writs of certiorari in both cases were filed on June 26, 1968.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In No. 232, whether the court below properly set aside, as unsupported by substantial evidence, the finding of the National Labor Relations Board that the Companies' refusal to recognize and bargain with the Union was not motivated by a good faith doubt as to the Union's majority status.

2. In No. 233, whether it is in derogation of due process for an attorney on the staff of the Board's General Counsel to investigate unfair labor practice charges filed with the agency and to prosecute a complaint which subsequently ensues.

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[1] Petitioners in No. 232 (the "Union") were permitted to intervene in the court of appeals by order entered on October 12, 1966, and thus have standing to file the petition in that case. *Mine Workers* v. *Eagle-Picher Co.*, 325 U.S. 335, 338.

3. In No. 233, whether substantial evidence supports the Board's findings, as upheld by the court below, that the Companies, in violation of Section 8(a)(1) of the National Labor Relations Act, coerced and restrained their employees in the exercise of their organizational rights.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 13-14.

STATEMENT

Petitioners in No. 233 ("the Companies") are a single integrated enterprise operating 17 retail drug stores in the Toledo, Ohio, area (J.A. 498).[2] Beginning in November 1964, pharmacist Nupp made several attempts to organize the Companies' pharmacists but withheld further action when Vice-President Kaye, who knew of Nupp's activities, promised to settle the pharmacists' grievances and to give Nupp a substantial loan provided the pharmacists refrained from forming a union.[3] During several conversations Kaye also mentioned to Nupp that he was "managerial material," and that if Nupp was not satisfied with his salary "something could be arranged * * *" (J.A. 535a-538a; 228a-229a). In April 1965, Nupp re-

[2] "J.A." references are to the Joint Appendix in the court below.

[3] J.A. 531a-538a; 123a, 207a, 224a-229a, 231a, 281a-282a, 306a-309a, 315a-317a, 461a-464a, 470a-471a, 483a-489a.

sumed his efforts to organize the pharmacists and conducted a meeting where his fellow employees authorized him to make contacts with local unions. About this time, General Manager Pethke told Nupp that it was none of his business what he felt about his colleagues and that he should resign.[4] Nupp then spoke to the Union and arranged for an organizing meeting with a Union official to be held on April 28, 1965. The Companies' officials had knowledge of his activities and of the meeting date, and discharged Nupp summarily at the end of his shift on the eve of the union meeting.[5]

At the organizational meeting on April 28, 1965, 16 pharmacists signed cards authorizing the Union to represent them, and three additional pharmacists signed cards by May 7.[6] On April 29, 1965, the Union, in a wire to "Lane Drug Co.," demanded recognition and bargaining on behalf of the pharmacists "in Greater Toledo and Bowling Green stores," and on May 4 it sent a wire to "Kaye, President Lane Drug Co.," repeating its demands on behalf of the same group of employees and offering to prove its majority through the Toledo Labor Management Relations Committee.[7] At that date the appropriate bargaining

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[4] J.A. 540a-541a; 123a-125a, 233a-236a, 280a-283a, 301a-309a.

[5] J.A. 544a, 558a-563a; 239a-241a, 284a, 386a-392a, 400a-401a, 443a, 457a-459a, 482a-483a.

[6] J.A. 543a-546a, 568a, 608a; 82a, 102a-103a, 108a-110a, 125a, 202a-204a, 253a-254a, 242a-243a, 286a-287a, 291a.

[7] J.A. 554a, 584a, 608a; 80a-82a, 98a-99a, 466a-467a, 499a-500a.

unit consisted of 32 pharmacists, of whom the Union represented 17.[8] The Companies wrote the Union on May 12, 1965, that they had "reason to doubt" the Union represented a majority of the pharmacists, and on the same day filed a representation petition with the Board claiming that the appropriate unit consisted of 25 pharmacists at their drug stores in Toledo and vicinity (J.A. 551a, 583a; 490a, 501a).

Subsequent to Nupp's discharge, Supervisor Wagenman asked a pharmacist who had been at the organizational meeting whether anybody had signed cards, and requested that pharmacist to keep him posted of further developments. He added that Nupp had been nothing but a troublemaker and should have been fired long ago (J.A. 546a; 125a-127a). Supervisor Willis questioned other pharmacists about the attendance at the meeting and the signing of cards (J.A. 546a-547a; 108a, 431a-435a). After the Union held another meeting on May 9, Vice-President Kaye approached a number of pharmacists[9] and asked them to abandon the Union (J.A. 549a). He specificaly requested pharmacist Maza to prevail on his colleagues in this regard (J.A. 548a-549a, 606a).

About 20 pharmacists went out on strike to protest Nupp's discharge on May 14, 1965, and 10 of the

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[8] J.A. 564a-568a, 608a; 108a-110a, 141a-142a, 144a-147a, 153a-155a, 190a-195a, 202a-204a, 253a-254a, 280a-287a, 501a, 451a-457a, 496a-503a; General Counsel's exhibits 3D, 3J, 3S.

[9] Maza (J.A. 102a-104a, 111a, 512a-513a); Nemetz (J.A. 127a-128a); Eisenhauer (J.A. 307a-308a); Hubbard (J.A. 104a-141a); Molnar (J.A. 293a-294a); and Baumgartner (J.A. 323a).

Companies' store were picketed.[10] During the strike, which lasted until May 28, Vice-Presidents Kaye and Rivelis and other supervisory employees approached several strikers and asked them to return to work and to discuss their grievances with the Companies on an individual basis, without resort to the Union.[11] Vice-President Kaye also stated that the Companies would never allow a union to be formed no matter what the cost, and President Amster wrote to all pharmacists that if they had problems they should talk to him directly instead of through a go-between and that he would "not talk to any Union organizer or outsiders." [12]

On the basis of these facts, unfair labor practice charges were filed against the Companies. Upon consideration of the evidence, the Board found that the Companies had violated Section 8(a)(1) and (3) of the Act by: (1) coercively interrogating employees; (2) promising them economic benefits if they dealt individually with the Companies; (3) enlisting employees to engage in surveillance and to dissuade other employee from supporting the Union; (4) soliciting employes to deal directly with the Companies instead of through a union; (5) threatening employees with economic detriment for continuing their union affiliation and endeavors to bargain collectively; and (6)

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[10] J.A. 551a-552a, 600a; 90a-91a, 114a, 116a, 140a, 160a, 286a.

[11] 552a-553a, 556a; 105a-107a, 114a-115a, 157a-158a, 204a-207a.

[12] J.A. 552a, 556a; 107a, 506a-507a.

discharging Nupp (J.A. 558a-563a, 590a-591a, 606a). The Board further found that 17 out of 32 employees in the appropriate bargaining unit had validly authorized the Union to represent them for collective bargaining purposes by May 4, 1965, and that the Companies' refusal to recognize and bargain with the Union on and after that date violated Section 8(a)(5) and (1) since motivated not by a good faith doubt as to the Union's majority status, but rather by a desire to gain time in order to defeat the Union (J.A. 583a-590a, 607a-608a). The Board ordered the Companies to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to Nupp, to bargain with the Union upon request, and to post appropriate notices (J.A. 593a-597a, 608a-609a).

Upon review, the court of appeals sustained the Board's findings, except in one respect,[13] that the Companies had violated Section 8(a)(1) and (3) of the Act and enforced that part of the order directing the Companies to remedy these violations (Pet. App. No. 233, 21, 22-24, 25-26, 32).

The court below, however, refused to enforce the Board's order requiring the Companies to bargain with the Union, rejecting as unsupported by the record the Board's subsidiary finding that the Companies' refusal to bargain with the Union was not motivated by a good faith doubt as to the Union's majority status (Pet. App. No. 233, 26-31). In the court's

[13] The court below set aside the Board's finding that the Companies had coercively interrogated employees (Pet. App. No. 232, 8a).

view, the Companies' officials could fairly have had such doubt because of: (1) the statement of a supervisor that several employees had told him that not many pharmacists were interested in the Union (*id.* at 27); (2) the decisive loss of an election by the Union in 1954 conducted in a different bargaining unit of the Companies' employees (*ibid.*); (3) the Union's "hurried" filing of a refusal to bargain charge on the first work day after its request for recognition (*id.* at 28); (4) the existence of a majority, "by a slim margin," a few days after such request (*ibid.*); (5) the lack of clarity in the Union's bargaining demands, which did not mention the stores operated by Lane affiliates in Sylvania and Oregon (*id.* at 29); (6) and because it was not wholly clear whether the pharmacist-managers and assistant managers (who the Board ultimately found were supervisors) and certain other named employees were in the bargaining unit (*id.* 29-30). The fact that the employer engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act was not, in the court's view, in itself sufficient reason to negative the Companies' asserted good faith doubt about the Union's majority status (*id.* at 31).

ARGUMENT

1. No. 232. Although the Board agrees with the Union that the court of appeals erred in refusing to enforce the Board's bargaining order, it has not sought review of this issue by this Court. The court below rejected the Board's finding that the Companies' refusal to recognize and bargain with the Union

was not motivated by a good faith doubt as to the Union's majority.[14] In the Board's view, the court's holding in this regard rests, at least in part, on grounds which are of doubtful validity and improperly discounts the significance of the Companies' contemporaneous unfair labor practices in assessing their good faith. For example, the statement of the court below that the "fact that the employer committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) is not of itself sufficient reason to negative a good faith doubt" (Pet. App. No. 233, 31) is questionable. However, the issue of the Companies' good faith in rejecting the Union's request for recognition is essentially evidentiary. Moreover, subsequent decisions of the Sixth Circuit make clear that it did not intend to take the position here that other unfair labor practices are irrelevant in determining good or bad faith.[15]

Petitioner further asserts that the instant case provides a suitable vehicle for resolving the alleged conflict among circuits regarding the significance to be accorded union authorization cards in bargaining

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[14] Absent such good faith doubt, an employer violates Section 8(a)(5) of the Act where, as here, he refuses to recognize and bargain with a union which in fact represents a majority of his employees in an appropriate unit. See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914, and *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), certiorari denied, 382 U.S. 830.

[15] See *National Labor Relations Board* v. *Atco-Surgical Supports, Inc.*, 68 LRRM 2200, 2201; *National Labor Relations Board* v. *Ben Duthler, Inc.*, 68 LRRM 2324, 2326; *Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 68 LRRM 2635.

order cases (Pet. No. 232, 9-17). As petitioner correctly points out (Pet. 10), review by this Court in three such cases was sought unsuccessfully last term. Despite reservations about the soundness of the court's evaluation of the substantiality of the evidence on the good faith doubt issue, the Board recognizes the presence here of various factual considerations which provide some support for the court's conclusion. Since the authorization card matter is only one among such factors, and since the court below did not purport to resolve definitively the significance of that factor in bargaining order cases (see Pet. App. No. 233, 31), the Board does not view this case as an appropriate one in which to seek again review of this issue by this Court.

Accordingly, in light of the foregoing considerations, we do not believe that further review is appropriate.

2. No. 233. The Companies' petition, as they virtually acknowledge (Pet. No. 233, 16-17), presents no issue warranting review by this Court. Indeed, they seek certiorari only if the petition in No. 232 should be granted (see Pet. 1, 17).

a. The Companies' principal contention (Pet. 6-15) is that the dual capacity in which counsel for the agency served—as investigator of the unfair labor practice charges filed against the Companies and as prosecutor of the complaint issued against them, which was based thereon—offends due process. That argument is insubstantial. There is nothing in the Act which bars an attorney who, on behalf of the Board's General Counsel, has investigated unfair labor

practice charges from serving as trial counsel in the event a complaint issues on those charges. The statute, in Section 3(d), vests in the General Counsel the authority to investigate charges, issue complaints and prosecute such complaints. Nor is there any inherent reason—certainly none of constitutional stature—why Board counsel should be barred from serving in this dual capacity. The Companies' assertion (Pet. 10) that such dual capacity "will inevitably lead to the issuance (or non-issuance as the case may be) of complaints regardless of the evidence" is wholly speculative. Finally, no claim is made here that there "was unfairness in the * * * trial itself" (*Humphrey* v. *Smith*, 336 U.S. 695, 697).[16]

b. The Companies' further contention (Pet. 15-16) that certain of the Board's findings are inadequately supported by the record presents no issue warranting review.[17] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In the light of the facts detailed previously, it is evident that the court below correctly concluded that those findings were supported by substantial evidence.

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[16] Section 5(c) of the Administrative Procedure Act, as amended (5 U.S.C. (Supp. II) 554(d)), which bars an officer, employer or agent of an administrative agency, engaged in the performance of investigative or prosecutory functions for the agency, from participating in the decision of the agency on the merits, has no relevance to petitioners' contention and no application whatever to the facts involved here. Nor has the Uniform Code of Military Justice (10 U.S.C. 827(a), to which petitioner also makes reference (Pet. 9).

[17] No challenge is made to the Section 8(a)(3) finding based on the discharge of Nupp.

CONCLUSION

Neither petition for a writ of certiorari presents any issue warranting review, and the petitions therefore should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HANS J. LEHMANN,
Attorney,
National Labor Relations Board.

JULY 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 3(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.
>
> * * * *
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate

for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 232.
OCTOBER TERM, 1968.

RETAIL STORE EMPLOYEES UNION LOCAL 954,
Petitioner,
v.
LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

LEONARD LANE,
ALAN ARNOLD,
LANE, KROTINGER, SANTORA, STONE & PURDY,
300 Chester-12th Building,
Cleveland, Ohio,
Attorneys for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

1. When the union's petition for certiorari in an unfair labor practice case reveals, and when the brief of the National Labor Relations Board in opposition to the union's petition concedes that the issue before this Court is primarily an issue of fact, and that the record raises no substantial or unique legal question, should the writ of certiorari be issued?

2. When the court of appeals concludes that there is no substantial evidence on the whole record establishing bad faith by the employer in rejecting a demand to bargain based on authorization cards, and when said court of appeals further concludes that the substantial

evidence on the whole record affirmatively shows good-faith doubt that the union possessed cards from a majority of employees in an appropriate unit, should such decision be reviewed by this Court?

3. Should the court of appeals, in reviewing an order to bargain (without the Board election which the employer requested) consider only such substantial evidence as supports the Board order and ignore substantial evidence on the whole record which militates against enforcement of the order?

SUMMARY OF ARGUMENT.

In arguing the facts as the basis for its petition, the union, which had been favored by a bargaining order of the National Labor Relations Board (160 N.L.R.B. 1147; J.A. 605-09) based on a claimed majority of authorization cards, would prefer that the court of appeals have ignored certain "separate factors" (Brief of Petitioner, p. 2) which militate against the order. These factors, however, are the basis of the Board's opposition to this petition for certiorari; for the Board admits that the court below was presented with "various factual considerations which provide some support for the court's conclusion" (Brief of Board, p. 10).

Thus, even the union and the Board cannot agree as to the weight to be given the various facts in the extensive record before the court below, and the petitioner is left with an argument based on fact and not on law. Such petition is not appropriate for granting the writ of certiorari.

Among the *undisputed facts* before the court of appeals, which the petitioner regards as mere "separate factors," are the following:

1. The only valid demand to bargain made by the union was, according to the Board's findings, based on a razor-thin majority of one card acquired less than one day prior to the demand (160 N.L.R.B. at 1149-50; J.A. 608).

2. Such alleged majority was determined only through the inclusion and exclusion of various potential members of the bargaining unit on grounds which the employer could and did, in good faith, dispute (160 N.L.R.B. at 1149, 1165-73; J.A. 567-83, 607-08).

3. The same union had presented a nearly-identical demand to the same employer at a previous time, and the ensuing Board-supervised election yielded a rejection of the union by a vote of 154 to 28 (J.A. 335-36, 528; Resp. Ex. G-3).

4. Prior to rejecting the union's demands herein, the employer was presented with evidence which indicated that a majority of employees did not favor the union (J.A. 431-32, 435).

5. The union admitted its reluctance, from the very inception of the organizational campaign, to submit to an election supervised by the Board (J.A. 96).

6. The union admittedly made an invalid demand to bargain and an invalid charge of unfair labor practices just a few days after the first organizational meeting (160 N.L.R.B. at 1150; J.A. 608).

7. The union presented unclear and inconsistent bargaining-unit descriptions in conjunction with its various bargaining demands (G.C. Exs. 1-A, 1-C, 1-E, 1-U, 6; J.A. 2-12, 36-37, 500).

In the three card check cases in which this Court denied certiorari during the October 1967 term (*Preston*

Products Co. v. NLRB, 88 Sup. Ct. 2058 (1968); *Bryant Chucking Grinder Co. v. NLRB*, 88 Sup. Ct. 2055 (1968); *NLRB v. Crawford Mfg. Co.*, 88 Sup. Ct. 1408 (1968)), such strong mitigating factors were not present, and the issues were primarily legal rather than factual. The opposite is true here.

Moreover, the decision below being primarily factual in nature, the criterion (Sup. Ct. Rule 19 par. 1(b)) that it be in conflict with the decisions of other courts of appeals cannot be met.

The court below was not bound to ignore the above facts, which in themselves reveal that this case does not present a clear-cut issue on the establishment of bargaining rights by means of authorization cards. Rather, these facts show that the issues herein are primarily evidentiary; that the court below did not violate the substantial evidence rule in considering them; and that the petition for the writ of certiorari therefore should be denied.

STATEMENT OF THE CASE.

Petitioner (Retail Store Employees' Union) has set forth an incomplete factual statement. Such statement reveals two assumptions, both of which unquestionably are incorrect, namely (1) that the petitioner may assess the decision of the court below solely on the basis of such evidence as supports the order of the National Labor Relations Board; [1] and (2) that petitioner may, in assessing that decision, disregard testimony which militates against the Board's order.

This selective evidentiary presentation seems to be part of an overall effort to have this Court review *de novo* all of the evidence on the record, since petitioner

[1] Hereinafter referred to as the "Board."

disagrees with the conclusions reached by the court of appeals. The following facts, however, all of which are undisputed and supported by the findings of the Trial Examiner and/or the Board, show that the court of appeals, in denying enforcement as to a portion of the Board's order, did not misconstrue its role in reviewing the whole record, and that the petitioner's quarrel with the court below is no more than a disagreement as to the effect of the evidence.

Throughout the relevant period, the respondents[2] operated an integrated chain of retail drug stores in Toledo, Ohio, and in the nearby municipalities of Bowling Green, Oregon, and Sylvania. Beginning on May 10, 1965, the employer began hiring additional pharmacists, including two pharmacists (G.C. Ex. 11; J.A. 504-05) to be stationed in another store which shortly thereafter began operations in Fostoria, Ohio.[3]

The very first manifestation of organizational activity on the part of the pharmacists in respondents' stores was a meeting conducted late on the evening of April 28-29, 1965 (Wednesday night and Thursday morning) (J.A. 238-239). One of the so-called pharmacist-assistant managers had been invited and attended (160 N.L.R.B. at 1156; J.A. 544), and no one can be certain as to how many pharmacists were present (J.A. 375). Prior to any request

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[2] Sometimes referred to hereinafter as the "employers" or the "employer." Either a singular or a plural reference is correct, since the respondents are, for purposes of section 2(2), (6), (7) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act"), 49 Stat. 450 (1935), 29 U.S.C. sec. 152(2), (6) (7) (1964), a single employer engaged in commerce (G.C. Ex. 4; J.A. 498).

[3] Fostoria, like the three communities mentioned in the text, might be considered part of the Greater Toledo area (160 N.L.R.B. at 1151, 1166 n. 40; G.C. Ex. 4; J.A. 69-70, 531-32, 565 n. 40).

that authorization cards be signed, a union organizer proceeded to tell the pharmacists present that "the Union did not intend to follow the election route to become the bargaining representative of the pharmacists" (J.A. 96).

After business hours on the very day the meeting ended, the union dispatched a telegram (G.C. Ex. 5; J.A. 35, 499) directed to only one of the corporate respondents, Lane Drug Company, which operated only those stores located within the City of Toledo (160 N.L.R.B. at 1151; J.A. 531). The telegram demanded recognition.

The Board found that demand to be invalid (160 N.L.R.B. at 1149-50; J.A. 608); since, at the time made, even adopting the Board's theory as to the size of the appropriate unit, the union did not possess cards from a majority of the pharmacists.[4]

When Vice-President Dr. George Kaye received the invalid demand on Friday morning, April 30, both he and Store Supervisor Willis found the wording of the demand reminiscent of a nearly-identical claim (Resp. Ex. G-1; J.A. 335-36, 526) made by the same union to the same company in 1954 (J.A. 435). The Board subsequently certified an election in which the union received only 28 out of 182 votes cast (Resp. Ex. G-3; J.A. 528).

Dr. Kaye, on the basis of this bargaining history, had some initial doubts as to the validity of the claim of majority representation. He therefore instructed his two supervisors to talk to the pharmacists and to determine the extent of union sentiment (J.A. 469-70, 480-81).

On the basis of uncontradicted testimony, the court below found (*Lane Drug Co. v. NLRB*, 391 F. 2d 812, 818

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[4] In fact, at the time of the demand, the union had no idea how many cards it possessed (J.A. 83, 97).

and n. 6 (6th Cir. 1968)) that Supervisor Willis, in a non-coercive manner (J.A. 431),[5] determined that there was no strong pro-union sentiment, and this information was reported back to Dr. Kaye. Willis reported such conversations as that of pharmacist David Yarnell, who indicated that "he didn't think many of the pharmacists were interested in the union, the ones he talked to." Pharmacists Langdon and Newhard said basically the same thing (J.A. 432-33).[6]

On Monday, May 3, 1965, without awaiting any reply to its invalid demand, and after the intervention of only one weekend from the receipt of the demand, the union filed an unfair labor practice charge with the Board (G.C. Ex. 1-A; J.A. 2). At that time, as the Board ultimately found (160 N.L.R.B. at 1149-50; J.A. 608), the union still did not possess cards from a majority. And this charge, like the demand, was directed only against respondent Lane Drug Company. Further, the charge indicated a bargaining unit of 25 pharmacists, which is perfectly consistent with the number of employees in the stores operated by that single employer.

On Tuesday, May 4, 1965, the union dispatched still another demand to respondent Lane Drug Company only (G.C. Ex. 6; J.A. 36, 500). This demand, like the ensuing complaint and the various unfair labor practice charges,

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[5] Willis testified:

"I just talked with the people, managers and the pharmacists and different ones in the store. * * * I just more or less listened to what they had to say about it, got their opinions. I mean, I didn't really do any questioning as to what took place" (J.A. 431).

[6] There was also the commentary of pharmacist Robert P. Abell who said "he was scared to death— * * * that he was actually afraid. He didn't sleep for a night or two for worrying about this thing" (J.A. 435).

caused considerable confusion, since it described a different geographical area and raised some doubt as to the precise bargaining unit which would be included. Precision, of course, was of ultimate importance when the Board found that, on the basis of the inclusion and the exclusion of various pharmacists on legally disputable grounds, the union had acquired a razor-thin majority of one card at some point in time prior to the May 4 demand.

On May 10, 1965, the respondents hired the first of two pharmacists for the Fostoria, Ohio store (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.). On May 12, 1965, the respondents rejected the union's demand because "they have reason to doubt your majority status, as claimed" (G.C. Ex. 7; J.A. 501).

On the same date, Lane Drug Company, who was clearly the only respondent to which a charge had been directed, filed a petition (G.C. Ex. 2-A; J.A. 490-91) for a Board-supervised election, to be conducted among the approximately 25 pharmacists in the stores of that employer.

On May 15, another pharmacist was hired. Two days later, on May 17, respondents employed the second pharmacist for the Fostoria drug store (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.); and on the next day, May 18, as expected and announced long before, the Fostoria store was opened (160 N.L.R.B. at 1166 n.40; J.A. 565 n.40).

These new employees constituted genuine accretion to what would have been the unit of employees eligible to vote in an election, and the Trial Examiner so admitted (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.). Therefore, respondent Lane Drug Company requested withdrawal of its more limited petition for an election (G.C. Ex. 2-C; J.A. 494).

On June 11, the union added still another description of the unit when it filed an amended [7] unfair practice charge against *each* of the respondents, now indicating a unit of "30 pharmacists in the vicinity of Toledo, Ohio, and in Bowling Green, Ohio" (G.C. Ex. 1-C; J.A. 3-5). The Board took up this description when it issued its complaint on June 17, 1965 (G.C. Ex. 1-C par. 9; J.A. 3-12).

Having withdrawn its first election petition on the basis of the attempts of the union to broaden the bargaining unit described, all of the employers joined in an election petition for the approximately 40 pharmacists involved in the combined operations in Toledo, Bowling Green, Oregon, Sylvania, and Fostoria (G.C. Ex. 2-B; J.A. 492-93). The Director of the Board's Eighth Regional office denied this petition on August 24, on the grounds that a complaint already had issued and that "the Union has not demanded recognition for the employees of Lane's of Fostoria, Inc. * * *" (G.C. Ex. 2-D; J.A. 494-95).

The Board did not agree with all of the fact findings of the Trial Examiner. One of the more significant areas of disagreement was in the exclusion of two pharmacists from the bargaining unit proposed by the union and General Counsel (160 N.L.R.B. at 1149; J.A. 607-08). It was this disagreement which led to the Board's finding that the first demand to bargain was invalid but that the bargaining order was justified on the ground that the union obtained *a majority of one card* just *one day prior* to the second demand. This razor-thin majority, plus the alleged

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[7] The union apparently was concerned about the use of an invalid demand and charge, followed by an attempt to "renew" the invalid demand and to "amend" the invalid charge. A letter of June 27, 1965 alleges that the union's demand "has remained in effect at all times since it was initially made * * *" (G.C. Ex. 1-U, Ex. C; J.A. 36-37).

violations of section 8(a)(1) and (3), was the sole basis for the order to bargain.

The court below ruled that the finding of section 8(a)(5) violation was not supported by substantial evidence on the whole record (391 F.2d at 818-20). In so doing, the court weighed all of the evidence, including such facts, eliminated from the petitioner's statement of the case, which militate against the Board's findings of bad faith, and which indicate that General Counsel did not sustain his burden of proving bad faith. In fact, the court below, after reviewing the whole record, determined that the substantial evidence affirmatively shows good faith.

REASONS FOR DENYING THE PETITION.

I. This Court Decided Only Last Term That Decisions Such as That of the Court Below Do Not Justify Allowance of the Writ.

The Board opposes the union's petition for certiorari on the ground, *inter alia*, that "the issue of the Companies' good faith in rejecting the Union's request for recognition is essentially evidentiary" (Brief of Board, p. 9). The Board concedes that, "despite reservations about the soundness of the Court's evaluation of the substantiality of the evidence on the good-faith doubt issue, the Board recognizes the presence here of various factual considerations which provide some support for the court's conclusion" (Brief of Board, p. 10). Thus, "the Board does not view this case as an appropriate one in which to seek again review of this issue by this Court" (*ibid.*).

The last reference is to three cases in which petitions for certiorari were denied last term. *International Union, UAW v. NLRB*, 392 F.2d 801 (D.C. Cir. 1967), *cert. denied*, sub nom. *Preston Products Co. v. NLRB*, 88 Sup.

Ct. 2058 (1968); *Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565 (2d Cir. 1967), *cert. denied*, 88 Sup. Ct. 2055 (1968); *NLRB v. Crawford Mfg. Co.*, 386 F.2d 367 (4th Cir. 1967), *cert. denied*, 88 Sup. Ct. 1408 (1968). In all three, the issues of good faith considered by the courts of appeals were far less ambiguous than they are here.

In the *Bryant* case, for example, at the time of the first demand, the union had a clear majority of 34 cards. 389 F.2d at 566. In the *Crawford* case, at the time of its first demand, the union had received cards signed by 100 out of the 172 production and maintenance employees in the appropriate unit, 386 F.2d at 369. The plurality was similarly large in *Preston Products Company*, 392 F.2d at 804.

In its attempt to distinguish those cases, the union implies that the case at bar presents a clear legal issue respecting good faith in card-check cases (Brief of Petitioner, p. 10). As the Board points out, this assumption is not correct.

For, in its petition, the union argues facts, not law. In the union's efforts to present a picture of legal clarity, it has been forced to delete from its statement all of the substantial evidence which militates against the Board's finding of bad faith.

Most of these factual elements, which the union attempts to demean by placing upon them the label of "separate factors," were not even present in the three cases in which certiorari was denied by this Court. Such facts make this case much less worthy of review than the cited cases.

In other words, as the Board admits, the questions of good faith set before the court below were singularly factual in nature, and thus the petitioner asks this Court

to perform the function assigned to the court of appeals of reviewing the whole record *de novo*.

The nature of the petition herein does indeed render the case "different from the three" cases decided last term (Brief of Petitioner, p. 10). But the difference favors the denial of the union's petition for certiorari.

II. The Court Below Reviewed Substantial Evidence on the Whole Record, Including the "Separate Factors" Referred to by the Petitioner Which Support the Decision Below.

The Board admits, in opposing certiorari, that there are "various factual considerations which provide some support for the court's conclusion" below (Brief of Board, p. 10). These "various factors" are so pervasive and so substantial that the union attempts to separate them as isolated evidence.

Such evidence, however, cannot be ignored. It must be and was reviewed by the court below along with the evidence which might tend to support the Board's conclusion. When all the evidence was weighed, it became apparent that the Board is correct when it tells this Court that the decision below does not present a legal issue particularly relevant to the question of authorization cards and their good-faith rejection.

Petitioner, however, being unsatisfied with the result, asks this Court to perform the duty of a court of original jurisdiction. Such is not the function of the writ of certiorari.

But, in an attempt to overcome this inherent obstacle to review by this Court, the petitioner attempts to phrase its second question in such a way as to make it appear that the General Counsel *undisputedly* established substantial proof of bad faith, and that the court below over-

turned a portion of the Board's order on the basis of isolated bits of evidence outside the main stream of General Counsel's case, which the petitioner calls "separate factors" (Brief of Petitioners, p. 2).

The following capsulation of these factors should sufficiently reveal that there is *no clear legal issue* of bad faith before the Court.

1. An earlier demand to bargain similarly based on authorization cards submitted by the same union to a member of the same employer group, followed by a Board-supervised election in which the union was rejected by a vote of 154 to 28;

2. The stated reluctance of the union organizer, from the beginning of the organizational campaign, to submit to a Board-supervised election;

3. The unseemly hurry of the union to make a bargaining demand and to charge the employer with bad faith in rejecting that demand only one business day after its receipt by the employer;

4. The lack of clarity by the union in indicating the particular employer unit toward which its bargaining demand was directed;

5. The inclusion and exclusion of certain pharmacists, and particularly pharmacist-managers and assistant managers (at least one of whom was invited to the first union organizational meeting), for technical reasons which could, in good faith, have been disputed by the employer and which affected the claim of majority representation;

6. The results of non-coercive interviews by employer personnel, indicating that a majority of the pharmacists in any appropriate bargaining unit would not have favored the union;

7. The fact, acknowledged by the Board, that the initial demand to bargain was invalid and legally unacceptable because not based on majority representation.[8]

The petitioner's strategy in attempting to isolate these key, undisputed facts is transparent. Petitioner would set aside the substantial evidence which moves toward the good faith of the respondents and would argue solely on the basis of selected portions of the record which it regards as favorable to its petition.

The petition thereby constitutes a rejection of the standard of review set forth by this Court in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 477-78 (1951). That standard was faithfully followed by the court below.

Construing section 10(e), 61 Stat. 146 (1947), as amended, 29 U. S. C. sec. 160(e) (1964), which was amended in 1947 *to require* the courts of appeals to search substantial *evidence on the whole record*, this Court held:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.* This is clearly the significance of the requirement in both statutes [Act sec. 10(e), 61 Stat. 146 (1947), as amended, 29 U. S. C. sec. 160(e) (1964); Administrative Procedure Act sec. 10(e), as amended, 5 U. S. C. sec. 706 (Supp. II, 1967)] that courts consider

[8] Most of these facts were before the employer prior to its rejection of the first invalid demand to bargain.

> the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment." [*Id.* at 487-88. (Emphasis added.)]

Here, the great weight of this contradictory evidence so well substantiates the refusal of the court below to uphold the Board's bargaining order [9] that the Board itself feels constrained to oppose the petition for review. Certainly, under such circumstances, it cannot be said that the court of appeals "misapprehended or grossly misapplied" the standard—which is the only "rare instance" in which this Court will review a finding of the court of appeals based on a review of the substantial evidence on the record considered as a whole. *Id.* at 491.[10]

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[9] The petitioner selects isolated evidence supposedly indicating that the employer's vice-president somehow divined on May 2 that the union would acquire its nineteenth card on May 7. Such reliance is consonant with petitioner's efforts to have this Court retry the facts, based on portion of the record most favorable to its position. For what it was worth, the court below reviewed the testimony referred to along with the remainder of the record.

[10] There is nothing novel in the application by the court below of the substantial evidence rule. The court below did not, as in *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966), upon which petitioner relies, hold that the Board had *abused its discretion* on the basis of evidence indicating that the Board should have reached a contrary result. *Id.* at 618. Rather, the opinion of the court of appeals reveals that it weighed the *whole record* and found in such record a lack of substantial evidence to support the finding of the Board that the respondents were not in good faith. This is precisely the function which the courts of appeals are expected to perform.

III. The Petition Raises No Issue as to Which the Courts of Appeals Are in Conflict.

The review by the petitioner, on pages 12 through 17 of its brief, of various decisions of the courts of appeals (many of which support the decision below) reveals the very types of differences in the substantial evidence on the whole record which would predictably yield different results. Therefore, the union's complaint that, in card-check cases, "what is substantial evidence to one reviewing court may be insubstantial to another" (Brief of Petitioner, p. 12) does not fairly account for the fact that variations in the evidence on the issue of good faith is bound to, and indeed should, affect the decision whether to enforce the bargaining order.

Unless this were a "rare instance when the standard [of substantial evidence] appears to have been misapprehended or grossly misapplied," there is no reason for granting the writ. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Further, there inheres in petitioner's argument with respect to conflict among the courts of appeals, the incorrect assumption that the court below declined to consider evidence of violations of section 8(a) (1) as relevant to the issue of bad faith, and that other courts of appeals have considered such violations in determining good faith or bad faith. The Board itself points out, in its opposition to the petition herein, that the first portion of this assumption is without foundation.[11] Secondly, the

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[11] "[S]ubsequent decisions of the Sixth Circuit make clear that it did not intend to take the position here that other unfair labor practices are irrelevant in determining good or bad faith" (Brief of Board, p. 9). In support of this statement, the Board cites NLRB v. Atco-Surgical Supports, Inc., 57 Lab. Cas. par. 12677 (6th Cir. 1968); NLRB v. Ben Duthler, Inc., 57 Lab. Cas. par. 12709 (6th Cir. 1968); Atlas Engine Works, Inc. v. NLRB, 4 CCH Lab. Rel. Rep. (58 Lab. Cas.) par. 12782 (6th Cir., June 28, 1968).

alleged differences among the courts of appeals in viewing evidence of other violations disappear when one recognizes that not all such violations are of the same nature. In applying the rule of substantial evidence as enunciated by this Court, the various courts of appeals have decided that it is the severity of the violation—the circumstances surrounding it—which determines its evidentiary value on the good faith issue.[12]

A comparison of the questions presented by the union's petition with the criteria established by this Court for the granting of writs of certiorari will be dispositive of the petition. These criteria, as set forth in Rule 19, par. 1(b), do not contemplate that this Court will use the writ to resolve disputed factual questions or to provide unrealistic legal formulas for the resolution of such questions.

CONCLUSION.

The petition for a writ of certiorari presents no issue warranting review. The petition, therefore, should be denied.

Respectfully submitted,

LEONARD LANE,
ALAN ARNOLD,
LANE, KROTINGER, SANTORA, STONE & PURDY,
Attorneys for Respondents.

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[12] The only authority who has not presented "a 'diatribe' against reliance on authorization cards" (Brief of Petitioner, p. 9) admits that the great weight of authority follows this rule of substantial evidence. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 858 (1967). Even the strongest case upon which the union can rely seems to have adopted the standard set forth in the text. See Joy Silk Mills v. NLRB, 185 F. 2d 732, 741-42, 744 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).